United States Court of Appeals for the Second Circuit

APPENDIX

ORIGINAL WITH PROOF OF SERVICE

77-7098

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

RICHARD I. CLARK, as Executor of the
Estate of BERNICE C. GRUPE,

Plaintiff-Appellee,

-against-

JOHN LAMULA INVESTORS, INC. and
JOHN J. LAMULA,

Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

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AFTERNOON SESSION

2:00 p.m.

(In open court; jury present)

JOHN J. LAMULA, resumed.

CROSS-EXAMINATION (Continuing)

BY MR. BLUM:

Q At the time that we recessed, Mr. Lamula, we were discussing the various features of Allegheny Beverage Corporation. I have yet another question with regard to the common stock of that company.

Is it not true that the common stock of Allegheny Beverage Corporation ranged in 1974 from a high of 2 3/4 to a low of 5/8?

MR. GOLDSTEIN: I think that should be broken down to what time in 1974.

THE COURT: I think you better take a more limited time frame.

Q Let's do it this way:

Is it not true that the common stock of Allegheny Beverage Corporation at no time in 1974 exceeded a price of $2.75 a share?

A I'm not sure.

Q You have advised us that you maintained yourself current on the affairs of Allegheny Beverage Corporation in connection with advising clients. Is that not so?

A Yes.

Q In the course of maintaining yourself current on such affairs, did you review the price? Was it not your practice to review the price of the stock from time to time?

A I would review the prices of all their securities, but I might not remember to the eighth of a point.

Q Was there some relevance, in your judgment, between the price of the common stock and the suitability of the convertible debentures for a person situated as Mrs. Grupe was situated at that time?

A No.

Q No relevance?

THE COURT: It did not affect the convertibility aspects?

THE WITNESS: It would, but not the quality of the assuredness of the debt.

THE COURT: I realize that.

Q You did not regard, then, the price of the common stock as having a bearing on whether the convertible debentures were a safe security for Mrs. Grupe in the spring of 1974?

A The safety of the debentures --

Q Did you or didn't you?

A What's your question?

(Question read)

A No, in my opinion the debentures were safe without regard to the price of the common stock.

Q Let's turn to DWG, if we may, for a moment.

Mr. Lamula, let me withdraw the reference to DWG for the moment and ask you if you have a Moody's record with you for -- well, let's see, do you have any for the year 1974?

A No.

Q Do you have a Standard & Poor's Bond Guide for any time in the year 1974 with you?

A If you have one, I'll look at yours.

Q Here's a Moody's. I show you page 57, where several lines down -- this one is dated August 1974 -- and several lines down -- I'll stand next to you, if I may, so you can see where I am addressing my attention.

Allegheny Beverage 6 1/4 percent '88, that is the issue that was in question here, isn't it?

A Yes.

Q In the convertible bond rating, they show the price range for the common stock in 1974 to that date as from 3 to 1 1/8; isn't that correct? I'll underscore where

I am reading.

A That's correct.

Q In your judgment, I think you have just testified, the price of the common stock is relevant only with regard to the convertibility aspect, is that right?

A Come again? I'm sorry.

Q I think the Court asked you, or the Court commented when we were talking just a few minutes ago about this stock, about this debenture, and the price of the stock, that you did not regard it as relevant except as it might relate to the convertibility feature. Is that not so?

A I weigh them separately. I weigh the debenture separately from the common stock. My judgment on the common stock is not affected by the price -- my judgment on the debenture is not affected by the price of the common stock.

Q Do you know whether or not the judgment of others who buy and sell or trade in convertible debentures of this sort is affected by the price of the common stock?

MR. GOLDSTEIN: I would object to that question, your Honor. I think it's too broad.

THE COURT: Yes, but it can be rephrased in a proper manner.

MR. BLUM: Let me try, your Honor.

Q Do you know whether or not it is customary in the securities industry, and in particular with people who make market in or who regularly trade in debentures of this sort, to consider the price of the common stock as relevant to the safety and suitability of the convertible debentures?

A Everyone considers the price of the common stock, but not in relation to safety. In relation to convertibility. When the stock goes down, the stock could be selling at 20, and it may be convertible at 22. But when the stock could go all the way down to 3, the bond can only go down, the debenture can only go down so much, and then it is supported because of the 6 1/2 percent. If that debenture goes to 50, that 6 1/4 percent is 12 1/2 percent on your investment, and that holds up the price of the debenture.

THE COURT: I think what Mr. Blum is trying to suggest to you is that the market, the stock market price of stocks, is sort of like a person's temperature, and when it starts to tumble, it indicates that there is something wrong with the company and that regardless of whether or not there has been any trading in the debentures, and regardless of whether or not there has been change in the listed prices, if you get a sudden movement in the stock price, it indicates that there has been some information distributed either favorably or unfavorably about the company and for that reason it should be considered along with other factors in valuing debentures.

THE WITNESS: Your Honor, a stock like Tampax, which is one of the outstanding stocks in the world and earns 25 percent net profit, fell from 180 to $16.

THE COURT: And does that --

THE WITNESS: What I am saying, your Honor, is that in buying the debenture, I create some -- I have some protection in that being assured of the income it can't go below a certain level.

The reason we were able to buy these debentures, your Honor, at a discount, is because the stock went down.

THE COURT: I understand that very clearly. But you speak of Tampax. Assuming there had been no market whatever for its debentures over the period of time you are talking about, and assuming that as of the time the stock was at its peak the debentures were selling at, let us say, 50 on a hundred, would you not anticipate that if the next transaction didn't take place until after the stock market price had tumbled so badly, that the next debenture price would also have gone down?

THE WITNESS: Your Honor, let's take Allegheny as an example, since we are talking about it, if I may.

THE COURT: All right.

THE WITNESS: There is a conversion price on Allegheny somewhere around $16.

THE COURT: Forgetting the conversion aspect.

THE WITNESS: No, I want to. At that point, people pay $1,000 for a thousand dollar bond because they thought they were getting the 6 1/4 percent plus the right of conversion. When the stock went down, the debentures went down, too, but the stock went all the way down to $3. The stock lost 80 percent of its value. But the debentures just went down 50 percent.

At that point, in my opinion, when they sold at 60 and 50 they were a buy, because at 50 they would produce 12 1/2 percent return on your money, in addition to knowing that you would get a thousand dollars when the debenture was called in or when it was due.

THE COURT: You do acknowledge as the stock value fell, the debenture value also fell?

THE WITNESS: Yes, your Honor, and this, if I may explain, is one of the reasons we buy these debentures, because we feel that the companies are good, the debentures are at a price where they yield 10, 11 or

12 percent, and we see very little room on the down side. They are still convertible. It is still conceivable that in five or six years we could see a tremendous market and the conversion will be worth something.

Q Mr. Lamula, is what you are saying in response to all of this that it was your judgment that these debentures had fallen about as far as they could go?

A It was my judgment that these debentures were good value at the time that we purchased them and at the time that we sold them and that anybody who purchased them at that time, or shortly before or shortly after, and still has them, has continued to receive the interest on their money at the rate of 12 or 12 1/2 or 11 percent, as in Mrs. Grupe's case she was getting 11 1/2 percent on all her investments, and except for the one item of $5,000, which has already been reorganized, all of these companies have continued to pay their interest, they are earning money now, and their sinking fund is working.

THE COURT: The question he asked you, Mr. Lamula, however, was whether it was your estimation at the time you sold these debentures that they had reached about the bottom they were going to go in terms of debenture price.

THE WITNESS: It was my opinion that they had, but I told Mrs. Grupe that they might go higher, but that wouldn't affect the quality of the bonds; that this would only be a question of buying and selling. Some panic could develop, but the companies were in a position, they were earning money, they were in a position to pay the interest on their debentures even if perchance they didn't pay interest on their stock.

This they could pass, because as a stockholder you are one of the owners. The company could say, "We are not doing too well, but we have to pay on the loan to Chase Manhattan, we have to pay on the loan to John Smith, who bought the debentures, otherwise we could be thrown into bankruptcy.

THE COURT: Put your next question.

Q Now, was it not a fact no dividend was paid on the common stock, cash or stock dividend, on the common stock, for 1972 or 1973?

A On the stock?

Q On the stock.

A Yes. But the interest was paid on the debentures.

Q Did you advise Mrs. Grupe that no dividend had been paid on the common stock of DWG for the two years previously?

A No. I assured her the interest was safe on the debentures.

Q You didn't regard the fact the company was not paying dividends to be relevant with regard to the safety of the debentures?

A As a matter of fact, it was within a few months after Mrs. Grupe bought them that they did start to pay debentures -- they did start to pay a dividend, a small cash dividend, and now they are paying 10 percent a year on their stock. And they have been paying it for the last three years.

Q You didn't regard it as relevant at the time that they weren't paying?

A No.

Q Did you know that they were about to resume paying a dividend at the time you recommended it?

A Mr. Posner told me they were thinking about it, but he was one of the large stockholders and one of the problems here is that they preferred stock dividends so that they don't have to pay taxes on the dividends that they collect, and DWG has paid five stock dividends since Mrs. Grupe bought the bonds on the stock.

Q Mr. Posner told you that himself, is that right?

A Mr. Posner told me that they were planning to pay dividends on the stock.

Q Was that published information at the time?

A Yes, it was.

Q Did you tell that to Mrs. Grupe?

A No.

Q You didn't think it relevant to her?

A No.

Q In recommending the safety that they were about to resume paying their dividends?

A Mrs. Grupe was not buying the stock, she was buying the debentures, which were going to pay her over 10 percent; and when they came due she would be getting a hundred percent profit.

Q You didn't see a significant enough connection between the two to call it to her attention?

A No. As a matter of fact, I prefer a company that pays a stock dividend on their stock because it reduces the conversion value.

Q Did DWG pay a stock dividend in 1972 or '73?

A They paid it in '74, '75 and '76.

Q They did not pay it in '72 and '73, a stock dividend?

A No.

Q Is it not also a fact the common stock of DWG ranged no higher during the course of that particular year than $2.38 a share?

A Yes, but that's why the bonds -- that's why the debentures were available for $550 with a 10 percent income.

Q Did you think it was a good speculation at that price?

A It wasn't a speculation. It was absolutely not a speculation.

MR. GOLDSTEIN: I object to the use of the word "speculation."

THE COURT: He has already answered the question.

Q Now, let's turn to Applied Data Research. Am I correct in my belief that no dividends were paid on the common stock in 1972-1973-1974?

A That is correct.

Q Of course, 1974 was still an infant year at the time that these were sold by you to Mrs. Grupe, but again you didn't regard that as a relevant piece of information?

A No. What I regarded as relevant was the interest income on the debentures and the fact that they had to buy them in and there were very few left outstanding and we sold debentures to the company for 20 points above the price Mrs. Grupe paid.

THE COURT: Mr. Lamula, try to confine your answers to the questions he is asking you. If there are other matters you want explained, your attorney will have an opportunity to bring it out.

THE WITNESS: Very well.

Q Isn't it a fact the operating revenues of Applied Data Research for 1973 was only about $10 million?

A That's right.

Q And is it not also a fact that the common stock never got above $3 a share in the course of 1974, and it ran much lower during the course of the year, didn't it?

A You are within the parameters.

Q Is it not also the fact that the market for these debentures during the course of the time you sold them to Mrs. Grupe was very thin?

A Yes, because the company was trying to buy them up. There were very little outstanding. It has to be thin if there is only 1,300,000 outstanding and people have them in their safe deposit boxes.

Q How many marketmakers were there at that time, if you know?

A There were several.

Q Two?

A No.

Q Three?

A Most of them were on the buy side, they were not on the sell side.

Q How many marketmakers were there, if you know, two or three?

A I believe three.

Q You yourself had made a personal investigation, you said, of the status of Applied Data Process, is that correct?

A Yes. I went to Princeton and talked to the officers.

Q You had information from discussing this which was in your judgment not generally known by others unless they had had the same opportunity to discuss it with the officers, is that correct?

A Any analyst could go to discuss it with them.

Q I see. But you had made the special effort in the case of this one and the others to do?

A I had done what, sir?

Q You had made the special effort to go to Princeton?

A Yes, because this is what I --

Q And Baltimore, and all the other places to talk to them?

A Absolutely. Because I wanted to be sure I knew exactly what I was doing and I could get the legitimate answers to my questions, and if my questions were not satisfied, I wouldn't deal in the security.

Q Then you felt, am I correct in this, that you were in a better position to advise Mrs. Grupe with regard to the value or the worth of these or their rating than the people in Moody's or Standard & Poor's, isn't that so?

A Yes. I told Mrs. Grupe that I didn't believe, I wasn't guided by Standard & Poor's or Moody's, that I set my own ratings by investigating the companies, by going to see them and getting answers to questions, and if I didn't get the answers that satisfied me, we wouldn't deal in the bond.

Q Let me pursue something hypothetically with you. How old are you, Mr. Lamula?

A I beg your pardon?

Q How old are you?

A Sixty-four.

Q So you were sixty-two at this time. Now, let's suppose that there was no John Lamula one day or that you retired or became ill, or let's suppose, carry it further, that Mrs. Grupe no longer lived in Albany or within ready reach of you.

Let's take the first hypothetical, that there is no John Lamula any more. What was it your view that Mrs. Grupe would do to obtain this same quality of information with regard to her debentures?

A All she had to do was hold these securities and she would be paid interest every month and she would be paid par beginning with '83, '84, '85, '87, '88, '89, '90 and '94.

Q So that -- you mean if she could manage to stay alive until 1994 --

A 1983.

Q In the case of one, and in the others it was as late as 1994, wasn't it?

A But they were paying interest and they are still paying it.

Q If she happened to need any of those funds at any point, for who knows what purpose, maybe it would be another trip to Europe --

A She what?

Q She might want to make another trip to Europe, perhaps make gift to another son, or became ill, if she needed some of the security, the safety she thought she was getting and there was no John Lamula, what is your view about where she ought to go to find out what to do with these debentures?

A Very simple. My view was that she would go to somebody like John Lamula, or would go to a reputable dealer and broker and ask him to go on the sheets. I told Mrs. Grupe that I would get her out of any of these that she watned to over a period of several months, that I wouldn't dump them in one day. We would go on the sheets. If someone came to me with a list of securities other than these and wanted to sell them and if I thought they should sell them, we would make a market in them; we wouldn't dump them in one day.

Q Was it your advice to her if there was no John Lamula she should go hunting for another one, is that correct?

A We didn't discuss the question.

MR. GOLDSTEIN: Objection. There is no testimony any such advice was given.

THE COURT: Sustained.

Q Let's talk about Arwood for a moment. Is it not true, Mr. Lamula, that the dividends paid on the common stock on Arwood declined steadily from 1968 to 1970, that they stopped paying dividends on the common stock of Arwood in 1970, and that through 1974 no dividends were made on Arwood's common stock?

MR. GOLDSTEIN: I would object to that part of the question that goes back to 1970 and before then. I think it is totally irrelevant to go back to 1968-1970.

MR. BLUM: If I may, your Honor, in the first place --

THE COURT: No, the question simply is: Is it a fact they had not paid dividends in four years? It is that simple, is it not?

MR. BLUM: The annual report contains a ten-year history and this annual report Mr. Lamula contends he handed to Mrs. Grupe and explained to her, and I am trying to lay a foundation if he explained the decline. The common stock dividends declined steadily from 1968 to 1970. In 1970 they terminated and were not resumed as of the time it was bought.

THE COURT: '68 to '70 is too remote, but I will ask you if they stopped paying stock dividends from '70 to '74 and whether he told her that.

Q Were you aware of it?

A Yes.

Q Did you advise Mrs. Grupe of it?

A No, because that was not a factor in my opinion.

As a matter of fact, the company has done so well that they have merged with Interlake. But the fact that they didn't pay a dividend is one of the reasons that the stock went down and made the debentures a good buy.

Q You mean to say that the debentures went down because the stock went down?

A The debentures went down because the stock went down, and that's what made the debentures a good buy.

Q Did you consider --

A I wouldn't have purchased --

Q Did you consider in advising Mrs. Grupe as to her investment decisions on safe securities whether or not Arwood common stock might decline further than it was in the spring of 1974?

A The company had turned around in 1974, but the important thing is that the interest was being paid and the fund, the retirement fund, was being continued. They were buying in bonds and we sold bonds to the company, and they have since merged with Interlake, and it's now one of the giants.

MR. BLUM: If I may, your Honor, this testimony about Interlake came out two days ago and we discovered that happened within the past four or five months.

THE COURT: Do you want it stricken?

MR. BLUM: I do, indeed.

THE COURT: I direct the jury to ignore it.

Q Let's talk about Inflight for a brief period.

A Which one?

Q Inflight Services, Incorporated. You referred not only Monday, but also today, I believe, to the fact that additional common stock of Inflight was issued and sold in -- when was that, Mr. Lamula?

A December 1972.

Q So that was a year and three or four months before you began discussing this debenture with this company and the debentures with Mrs. Grupe, is that correct?

A We had been dealing in the debentures but the company sold more common stock in December of 1972.

Q At what price did they sell it?

A At $3.75.

Q Isn't it a fact that the range of the common stock price of Inflight for 1974 was to a high of $1.25 a share and a low of 50 cents?

A Sir, you asked me whether stock was sold and I have a memorandum here that Burnham & Co., your friends --

Q Again --

A -- sold 650,000 shares --

MR. BLUM: Again I ask the witness be instructed to answer the question.

THE COURT: Just answer the question he asked you, and that is: If you know, did the stock sell at the prices he quoted?

A Yes, I know that. And that was after this issue.

Q Yes, that was at the time that these securities, the debentures, were being sold to Mrs. Grupe, and did you think that that bore on whether or not the debentures were a safe investment for Mrs. Grupe?

A Yes, because over $2 million had been raised by Burnham & Co. in the sale of these securities and that lent more stability to the bottom, it helped with their bank loans, and they were able to get bank loans at a lower interest rate, and the sinking fund had already begin with this company. They were already begining to buy in $300,000 a year.

MR. BLUM: Your Honor, once again --

THE COURT: Please, Mr. Lamula, just answer the questions asked.

Q The fact that the stock had in the course of some fourteen months dropped to maybe one quarter of its value at the time it was issued didn't affect your judgment as to whether the debentures were safe for Mrs. Grupe?

A I was of the opinion that they were safe for

Mrs. Grupe and for my father-in-law, and for Miss Emerson.

THE COURT: Don't volunteer, Mr. Lamula, please. Just answer the questions he is asking you.

Q Isn't it a fact that in 1972 -- in 1971 and in 1972 Inflight, as recorded in its annual report, showed losses, and indeed the loss in 1972 had been almost $300,000, is that not so? If you wish to, examine it.

A Which year are you talking about?

Q '71 and '72.

A I show a loss of '71 and '72 and a profit in '73 and '74.

Q It doesn't show '74, does it, because '74 wasn't recorded in the '73 report.

A No, but we had --

Q '71 and '72 showed losses?

A This company has a fiscal year -- I am sorry, so you know the facts, this company has a fiscal year ending June 30.

Q The periods reflected there then are the fiscal year ended in June of 1971 and in June of 1972 and in June of 1973, correct?

A Right.

Q So for the first two of those, it showed losses, is that not so?

A Yes.

Q And in the third it showed a profit of -- it showed net earnings of $68,000, isn't that true? To the nearest thousand, it is 68,000, isn't it, $68,575, to be exact?

A (No response)

Q Mr. Lamula, are you familiar with that annual report?

A I am.

Q Can you find where it shows the 1973 earnings?

A They show a loss in '72 and a profit in '73.

Q And what was the profit that she showed -- what was the amount of the loss shown in '72?

A The amount of the loss in 1972 was 249,000, and the amount of depreciation was 2,247,000.

MR. BLUM: Would the Court please respectfully instruct the witness?

THE COURT: Yes.

Q What was the profit shown in '73?

A 68,000.

Q Now, isn't it a fact as reflected in that annual report that the Internal Revenue Service had suggested to Inflight Services that they should adjust the -- I believe it was the depreciation deductions which they had taken in previous years -- but in any event, adjust their tax returns in previous years, and doesn't one of the footnotes reflect the possibility of additional taxes for the years '66 to '75 having to be paid in the amount of $510,000?

A Yes, but that would only give them the opportunity to take further depreciation later on.

Q That's correct. But for a company with gross revenues of $18,500 -- I am sorry, $18,500,000, at that point, and a net income of $68,000, with the potential of additional tax liabilities of $510,000, did those factors not strike you as having bearing upon whether the debentures were suitable for Mrs. Grupe?

A They were suitable for Mrs. Grupe because of the extra money that Burnham raised through a stock issue of $2,200,000.

Q You certainly didn't advise -- you didn't read to Mrs. Grupe the footnote with regard to the potential for an additional $510,000 tax liability, did you?

A What I explained to Mrs. Grupe --

MR. BLUM: Your Honor, I believe the witness answered.

THE COURT: If you wouldn't state your questions quite so argumentatively, he wouldn't have quite the opportunity to argue with you that's developing.

MR. BLUM: I will try to ask them in a nonargumentative manner.

Q With regard to Knight Industries, the gross operating income of Knight, the gross revenues, was on the order of $6.1 million, wasn't it?

A (No response)

Q Once again, with regard to Knight, its operating revenues are a little over $6 million, aren't they, or were for 1973?

A Yes.

Q That was the smallest in terms of operating revenues of all of these companies whose debentures were sold to Mrs. Grupe, isn't it?

A Right.

Q Did you read to Mrs. Grupe the president's letter at the beginning of that annual report when you reviewed other features in it with her?

A I did.

Q You read her then the letter. You read her the part that said that it was anticipated that because of various difficulties referred to, the first quarter of 1974 will be disappointing. Did you have any comment to make to her at the time you recommended these debentures?

A That that would make the debentures -- would give us a buying opportunity for the debentures.

Q What were the gross revenues of that company in 1972, just the year previous?

A 2 million 8. 3 million 2.

Q I thought it was 2 million 9.

A No, 3 million 2.

Q What was the loss the company realized on 3.2 million of earnings only a couple of years before 1974?

A $398,000.

Q $398,000, almost $400,000, on 3.2?

A It was $398,000.

Q And you recommended that this debenture was a safe debenture for Mrs. Grupe in March or April or May of 1974?

A Yes, I did, because the debenture was less than a million dollars and the sinking fund was being paid off.

Q How many marketmakers were there with regard to this one?

A Probably only two or three, and the main one was a company called Advest & Co., which was a large stock exchange firm who brought this issue out the first time.

Q Did you advise Mrs. Grupe that if you were no longer there she might be able to get guidance with respect to Knight from Advest?

A I didn't go into the question whether I would no longer be there or here.

Q With regard to Lincoln Mortgage Investors, that's a real estate investment trust, isn't it?

A Right.

Q If you know, what was the status generally, so far as earnings and profitability are concerned, of real estate investment trusts in the spring of 1974?

A Many of them that were only in mortgages were in difficulties.

Q Isn't it true that the president's letter in the annual report of Lincoln Mortgage Investors indicates that the company had foreclosed on two of the loans?

A Yes.

Q Now, was that a factor which you advised Mrs. Grupe of when you were discussing these securities with her in the spring of 1974?

A I told her that that meant that the company would own the properites and that the more properites they took over, the better off they would be, because then they would have a management interest and ownership in real estate and they would be better off with real estate and being owners, rather than just holding mortgages.

Q In short, it was your advise to her that they were better off foreclosing on their loans than collecting the payments of interest and amortization on the loans?

A Where there was a development in the interest and amortization, I was of the opinion, and I went to see Lincoln Mortgage, I was of the opinion they were doing the right thing by taking over the properites and running them and collecting the rents, that they would be better off than just waiting to try to collect the interest from former owners.

THE COURT: Is Lincoln Mortgage associated with some other lending institution?

THE WITNESS: One in California is a managing company.

THE COURT: It is not a subsidiary of a bank or an insurance company?

THE WITNESS: It is identified with a bank in California, your Honor.

MR. BLUM: It is a California concern.

THE COURT: Most of these mortgage companies tend to be either subsidiaries of or connection with a bank or insurance company.

THE WITNESS: In the same way as Chase Manhattan Trust, your Honor.

THE COURT: This one was connected with a

California bank?

THE WITNESS: Right.

Q Is it not also true that the letter of the president of Lincoln Mortgage Investors, which appears in the annual report, refers to the increasing pressure on their investments in the following terms: "The rising interest rates that exerted pressure on the trust's profit margin throughout 1973 also contributed to the development of the several problems within the trust's loan portfolio discussed above. The facts that interest rates have risen since March 31, 1973, and continue to rise in this, the fourth month of fiscal 1974, make it seem likely that financial pressure on the profit margin will be with us for at least a few more months."

Did you read that passage to Mrs. Grupe?

A Yes, of course I did.

Q You read that to Mrs. Grupe?

A I went over the report with Mrs. Grupe. I don't remember that particular sentence but I went over the entire report with her.

Q Did you regard that statement by the president of this company as having any bearing on whether or not these convertible debentures were a suitable investment or a safe investment for her?

A I regarded that that statement was such that the debentures became a good buy because that reduced the price of the debentures and when they were in the area of 50 I began to buy them for many clients because that was a 16 percent return, and the company was considering changing its status so that it wouldn't have to pay dividends on its common stock.

Q Mr. Lamula, you stated some time ago in the course of your testimony today that you are a member of the NASD. Are you aware of the provisions of Article 3, Section 2, of the NASD Rules of Fair Practice with respect to suitability?

THE COURT: If you have a copy, you should show it to him. Don't test his recollection.

Since you are showing it to him, I think you should mark it for identification.

Are you referring to a standard published treatise now which you can cite?

MR. BLUM: Commerce Clearinghouse National Association Manual is what I am referring to, your Honor, and to Article 3, Section 2, which appears at paragraph 2152.

THE COURT: This is NASD rule --

MR. BLUM: Article 3, Section 2.

THE COURT: Do you wish to have this marked for identification, or do you think the fact it is a CCH service is adequate?

MR. BLUM: I think it is. I have other copies in the appendix. I will request it be marked, and if Mr. Goldstein will agree, we will mark it at the close of business so we don't delay in doing so.

THE COURT: The question is whether the witness is familiar with this particular rule as to suitability.

A Yes, I am.

Q Will you read it?

A "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by such customer, as to his or her other security holdings and as to his or her financial situation and needs."

I interpolated the word "hers" so it would refer to Mrs. Grupe.

MR. BLUM: Thank you.

THE WITNESS: You are welcome.

Q This company had shown declining income --

A Excuse me, did you have a question in connection with that?

A No, I just wanted to establish your familiarity with it, since I was raising questions of safety and suitability.

With regard to Lincoln Mortgage Investors once again, in 1972 and 1973 the income declined, didn't it?

A Yes.

Q Did you advise Mrs. Grupe of that fact?

A Yes, I showed it in the annual report.

Q Did you tell her notwithstanding that fact you deemed the convertible debentures of that company as a suitable and safe investment for her?

A I said they were a good investment for her because in my opinion the income was safe and the income would amount to about 15 percent at her cost and that the company would soon change its status so that it did not have to pay a dividend on the common stock. In that instance, it was still paying a dividend on the common stock.

Q In that instance, it was still paying a dividend on the common stock?

A Yes.

Q In '72 and '73?

A Yes.

Q I had not known that was so. I wonder if you can identify the place it may be.

A Identify what?

Q I wonder if you can show me in the annual report what it says the dividend was of the common stock in 1973.

MR. GOLDSTEIN: Your Honor, I don't see how this is proper questioning since the witness testified they did pay a dividend.

THE COURT: Mr. Blum is suggesting that the payment of dividends is not a matter corporations generally keep secret, they usually make reference to it, indeed proud reference to it, in their annual reports; and he is now asking the witness to point out where in the annual report it refers to the payment of dividends.

MR. BLUM: I am not sure. I couldn't find reference to it when I examined it last night, your Honor.

THE COURT: I understand. Did you find any negative reference or just no reference?

MR. BLUM: I couldn't find any reference and that's why I was hoping Mr. Lamula, who is familiar with this, could find it for me.

THE WITNESS: "Dividends declared. In the first quarter, $287,000. Dividends declared on the stock in the second quarter, $287,000. Dividends declared in the third quarter, $287,000. Dividends declared in the fourth quarter, $231,000. Dividends declared for the entire year on the common stock only, $1,092,000."

Q Did you comment on that fact to Mrs. Grupe when you reviewed the annual report with her?

A I went through the annual report and showed her what the earnings were, what they were paying, but more importantly --

MR. BLUM: Again, your Honor, my question was, and I don't think it was argumentative --

A It is not argumentative. I will not argue.

Q Did you tell her it was paying dividends on the common stock?

THE COURT: A simple yes or no can answer it, if you can remember.

A I don't recall specifically, but in answer to your question, you said this company wasn't paying dividends.

Q No, I asked you whether it was.

A Here it is.

Q Thank you. I am asking whether or not you advised Mrs. Grupe of that.

A I probably did. I don't recall the answer to that because we were talking primarily about the debentures.

Q You say you probably did?

A I beg pardon?

Q You say you probably did?

THE COURT: That's what he said, yes. Put your next question.

Q The next question is if you probably did, why did you probably do so?

A I was attempting to reveal or to go over and review everything that was in the annual report and the proxy statement so that Mrs. Grupe would have a rounded picture of the company and so that she would then be able to make a further study on her own as I had requested her to do.

Q Did you not regard it as equally worthy of mention in the case of all of the others that we have talked about that they were not paying dividends on the common stock at the time you reviewed the reports with Mrs. Grupe?

A It isn't so that all the others were not --

Q Excuse me, up to this point only Allegheny, which you pointed out, was paying stock dividends, but every other one we have talked about between Allegheny and Lincoln you have conceded was not paying dividends. Now, I am asking whether or not you probably mentioned that fact to Mrs. Grupe or whether or not you failed to mention it.

A I probably did. I reviewed the stock, I reviewed the conversion ratio, and I reviewed the suitability of the bonds because of the interest income and the sinking fund provisions.

Q Is it not a fact that during the year 1974 Lincoln common stock traded at a high of $4.38 a share and the price went down?

A Yes. That's why the debentures were available at those prices.

THE COURT: Don't volunteer, Mr. Lamula.

Q With regard to Nortek, did that company pay any dividends in 1972 or '73?

A No.

Q And that was something you advised Mrs. Grupe of?

A Yes. I reviewed it, and I also reviewed the fact that they were purchasing other companies.

Q Did you tell her that the fact the company paid no dividends in 1972 or 1973 made the convertible debentures a good buy for her?

A Yes, because the price of the debenture went down.

Q I see. Did you suggest to her if the company continued not paying dividends on its common stock the price of the debenture might go further down still?

A No, not likely. After it reached a certain level, the interest income would keep it up, and if they made money and didn't pay any dividend on the common stock, that would make the debenture stronger.

Q Did you not just a moment ago mention something about buying other companies with regard to Nortek?

A Yes.

Q You mentioned that you advised her it was buying other companies, is that correct, during that period of time? I don't mean to put words in your mouth, but I thought you said something to that effect.

A They were negotiating to buy other companies.

Q How did you know that?

A They told me. It was public knowledge.

Q Had they acquired other companies in recent years prior to 1974?

A I think they acquired one prior to 1974 and one in '74 and one in '75.

Q Isn't this the outfit that bought up Vappi?

A I beg pardon?

Q Is this the outfit that bought up Vappi?

A No.

Q Which one was that, Technical Operations?

A Yes. Vappi is part of Technical Operations.

Q The sales of Nortek had tripled in fact from 1968 to 1975, hadn't they?

A I beg pardon?

Q The sales of Nortek had tripled from 1968 to 1973, hadn't they?

A You are going all the way back to 1968.

Q I am referring to the annual report, which is the only data that I have to work on.

A Yes.

Q And that was the only data, as I understand it, that you gave Mrs. Grupe to review, and I tried to put myself in her position for this purpose.

A The sales went from 13 million to 41 million.

Q Virtually tripled in that period of time, didn't they?

A I beg pardon?

Q They virtually tripled from 1968 to 1973, correct?

A Approximately.

Q What happened to the earnings per share in the same period of time, fully diluted?

A The earnings per share were 76 cents, 78 cents, 64 cents, 34 cents, 38 cents, 53 cents.

Q They seem to have declined from 1968 from 70 cents to 53 cents.

A Not unless you consider depreciation, which is something you have to consider. Depreciation increased from 223,000 to 1,500,000.

Q Again, your view is that there was a vault somewhere they had that money?

A My view is depreciation is money that stays in the till.

Q Just sits there?

A I am sorry.

Q It is money which just sits there?

A It doesn't sit there. The company has it to use.

Q It is a dollar reserve set aside somewhere, in your view, is that correct?

A It is not set aside. It is in the company's hands. Instead of being paid out as salaries, instead of being paid out for merchandise, it stays with the company, and they don't pay any taxes on that money.

Q It is a fact net earnings per share fully diluted declined while the earnings tripled?

A That is because the depreciation --

Q I think you should answer the question.

A Don't you really want all the facts, Bob?

THE COURT: Mr. Lamula, your attorney will ask you about all the facts you want him to. For the time being, just answer the question. As a matter of fact, the question was more rhetorical than anything else.

MR. BLUM: I will withdraw the question.

Q Did you advise Mrs. Grupe the net earnings per share had declined by almost 30 percent while at the same time the gross revenues of the company had been tripling?

A I advised Mrs. Grupe about the gross revenues --

Q Yes or no?

A I am answering your question.

THE COURT: Can you answer that question yes or no?

THE WITNESS: Did I advise Mrs. Grupe --

Q Did you advise Mrs. Grupe that the net earnings per share were declining across that five- or six-year period while at the same time the gross revenues had been mounting?

A I advised her --

Q Yes or no? Can you answer that yes or no?

A Don't you want the answer?

Q The Court asked you if it can be answered yes or no.

A I can't answer it yes or no.

Q Then you have some other answer for it?

A Yes.

Q Would you please give us that other answer.

A I advised Mrs. Grupe the sales were going up tremendously; that while the earnings were going down slightly, they were taking such heavy depreciation from 223,000 to 1 million 5 hundred, and that 1 million 5 hundred stayed in their pocket and they were on the verge of buying new companies. As a matter of fact, within a few days after Mrs. Grupe bought these debentures, within a day or two after, this company put out a tender offer, they wanted -- they came to me and they wanted to buy five --

MR. BLUM: If I may, the witness is going beyond what he advised Mrs. Grupe or whether he advised her.

THE COURT: He reached the outer limits of what he told her about this particular aspect of it.

Q That company showed a 1972 loss, did it not, of $7 million or so? Isn't that correct?

A You say it showed a loss? I am sorry, is your question --

Q My question is, did it show a loss in 1972?

A No.

Q It did not?

A It showed a profit.

Q Did it pay dividends in 1972 to 1973?

A No.

Q Did you advise Mrs. Grupe of that fact?

A Yes.

Q At some point down the line there you began advising her -- withdrawn. That is argumentative. I don't think I need to get into that.

Let's talk about Technical Operations. Do you have that letter which you read to the jury, which was marked Plaintiff's 17 in evidence? Is that still before you, a letter dated May 24?

A Yes.

Q In that letter, I quote you correctly when you read the following, I am sure: "Technical Operations, which does over a hundred million a year."

Isn't it a fact, however, that the annual report of Technical Operations for 1973 recorded a gross revenue of $79 million?

A Yes. They showed $79 million, but for the first quarter of '74, which we already had, they showed some 24 million.

Q I see. So this was your projection?

A Yes, we were talking in terms of May and we had the figures in for the first quarter and I had some tentative figures for the second quarter.

Q This also was a very thinly held issue, wasn't it?

A It is a $4 million issue, sir.

Q At the time?

A I am giving you the size.

Q How many marketmakers were there?

A Four or five.

Q Again, if there were no John Lamula and Mrs. Grupe wished to sell these, how would she go about finding a buyer for it?

MR. GOLDSTEIN: Your Honor, I think that question has been asked and answered.

THE COURT: Yes, it has. Sustained.

Q Technical Operations is the one where there was the merger with this construction company, Vappi, to which you had referred to Monday, is that correct?

A Right. That is correct.

Q That I think you told us you regarded as a factor of great significance in making this a suitable and safe investment for Mrs. Grupe, is that not so?

A Yes. I believe that it helped, it strengthened the debentures.

Q When did the Vappi merger occur?

A In 1971.

Q Is it not a fact that in 1972 and for 1973 and 1974 Technical Operations ceased paying dividends although they had paid them prior to that point?

A Yes.

Q So although it was a great boon for the convertible debentures, in your judgment the fact that the common stockholders lost their dividends had no relevance?

A Mr. Vappi had 600,000 shares. He had 45 percent of the common stock. When they passed the dividend, he didn't want to pay any taxes on it.

Q The fact that that kind of control appeared to you at the time that you sold these debentures to Mrs. Grupe did not affect your judgment in recommending them to her?

A No, because the issue was only $4 million and Mr. Vappi was putting a $50 million corporation behind this and taking common stock, and his common stock came after Mrs. Grupe's four debentures.

Q Now, what happened to the common stock during the year 1974? What was the high for that common stock during that year?

MR. GOLDSTEIN: Again, your Honor, I think it should be restricted prior to May 1974.

THE COURT: Yes, up to the end of May.

MR. BLUM: Again, I can deal, your Honor, with the highs for the year, so I will have to ask the question then in a perhaps more argumentative manner.

Q Is it not a fact the common stock of Nortek did not exceed $6.75 a share during the entire year 1974?

A Nortek or Technical Operations, which are we talking about?

Q I am sorry, Technical Operations.

A That is approximately right.

Q It did not go over $6.75 a share?

A Yes.

Q With regard to Monroe, which I think you have described two days ago as an interesting company, as you described many of them as interesting companies, the president's letter says in the annual report: "The first quarter earnings for 1974 should be down"; doesn't it?

Let me withdraw the question.

Let me read this passage from the annual report to you and ask you if you reviewed this passage with Mrs. Grupe.

"We are now well into the first quarter of fiscal 1974. While overall sales are up approximately 8 percent over last year, sales of knitted fabrics processed by our manufacturing facilities have declined. This decline has resulted in reduced production activity and losses at these facilities. Our woven print operations continue to set new highs in sales and profits. However, as a result of production losses and reduced margins on knitted fabrics in the first quarter, we anticipate reporting a loss for this quarter."

Did you read that passage to Mrs. Grupe?

A I probably did.

Q Did you regard that as tending to make the debentures a more suitable and safe debenture for her?

A I did, because Monroe had sold some additional stock in September of 1971, they sold 600,000 shares of stock, which brought in more money, and because the debenture issue had been reduced to about $1,600,000. That was my best judgment at that time.

Q Do you know what they issued that stock for when it came out?

A I am sorry, I don't hear you.

Q Do you know what the stock sold for when it issued?

A Yes. At $6 a share.

Q And do you know --

A And they sold 600,000 shares.

Q I beg your pardon?

A 600,000 shares were sold by Thompson McKinnon Auchinclos.

Q Can you tell us what the common stock was selling for in or about the spring of 1974? Do you know?

A In the area of about $3.

Q Isn't it a fact that the stock on May 22 or 23, 1974, was bid at a price -- excuse me, was offered at a price of 88 cents a share?

A Do you have that there?

Q That's the information which was provided to me, but, again, I'm not testifying and I'm not sure --

A You have a book before you and I don't have a book before me on the price of the stock.

Q I don't have a book before me.

THE COURT: The long and short of it is he doesn't know. Move on to the next question.

Incidentally, how much longer do you expect to be?

MR. BLUM: Half an hour, your Honor.

THE COURT: Do you want to take our afternoon recess at this time?

MR. BLUM: It might be advisable.

THE COURT: Take the jury out.

(In open court; jury not present)

THE COURT: Mr. Lamula, I have had to caution you four or five times about volunteering responses and about not answering questions.

Now, you have had legal training. I don't know whether you have been admitted to the bar or whether you merely went to law school, but you understand how this system works and there is no excuse for you continually volunteering matters simply because you want to volunteer them. You are to answer the questions that are asked and not to volunteer anything in addition.

THE WITNESS: May I ask your Honor to accept my apology, please.

THE COURT: I accept your apology. Let's have it stopped.

Bring the jury in.

(In open court; jury present)

THE COURT: Incidentally, are you admitted to the bar?

THE WITNESS: In Georgia. But I have never practiced.

(After recess)

CROSS-EXAMINATION (Continuing)

BY MR. BLUM:

Q I want to go back and pick up one question with regard to Knight Industries. Mr. Rowney pointed out in his testimony, Mr. Lamula, that there was reference in the annual report of Knight to a litigation involving some $600,000 counterclaim. Did you point out that piece of information to Mrs. Grupe in discussing with her the recommendation of Knight debentures?

A Yes.

Q What did you say about it to her?

A I said there is a litigation on, but I talked to Mr. Knight and his attorneys assured me that there is no valid claim against them, that it would probably be settled in their behalf.

Q You then did not regard the fact that the exposure was referred to in the note as the basis for caution in the investment? Is that correct? Did you regard the fact that the litigation was referred to in the annual report as a basis for caution in the investment?

A I regarded it as important, and I inquired of the officials of the company.

Q I think Elco was the only one of these that we have not specifically discussed. I think you said yesterday, that the adjective you used, was that Elco was intriguing and interesting. And I believe you referred to a tender offer or some merger prospect with Gulf & Western. Is that correct?

A Yes.

Q What dividends, if any, were paid on the common stock of Elco in 1972 and 1973?

A No dividend.

Q And none was paid in 1974, at least prior to the point at which these were sold to Mrs. Grupe in July, isn't that so?

A I am sorry, sir.

Q There was no common stock paid on Elco in 1974 prior to July 10, which was the date of the transaction?

A No, sir.

Q With respect to this sale to Mrs. Grupe, had you provided her with the annual report of Elco --

A Yes --

Q -- prior to July 10, 1974?

A Yes.

Q When did that occur?

A I sent it to her -- I discussed it with her over the phone and then I sent her a copy of the report and a copy of the proxy statement, in which I --

Q This was in the beginning of July 1974?

A Yes.

Q Do you recall whether there was any covering letter with respect to that or not?

A I had discussed Elco with Mrs. Grupe. I had told her that there were a number of tender offers made in March and April, and I sent her a copy of the annual report and copies of the tender offers from the Dow Jones tape to indicate that there were several other companies bidding for Elco.

Q I show you Plaintiff's 32. Did you write that letter to Mrs. Grupe at about that time?

A Yes, I did.

Q You also wrote her a letter on July 8, two days earlier, did you not, in which no mention was made of Elco, isn't that so?

A May I see the letter?

Q Yes. Plaintiff's 31 (handing to witness).

A The letter of July 8 was for an entirely different purpose. It was just a brief note and outlined that she was ot receive two checks.

Q Well, then, did the discussion with respect to Elco first occur -- withdrawn.

Mrs. Grupe testified, I believe that she got home on July 5 and found the debentures which you had mailed to her sometime while she was in Rome. And your letter of July 8 responds to that, doesn't it?

A The letter of July 8 --

Q Your letter to Mrs. Grupe of July 8 responds to her letter to you which was received on July 8, doesn't it?

A Right.

Q Now, it says, "Was delighted to hear from you and Dorothy. The key details of the trip sound fantastic," and so forth. Nothing about Elco. But on July 10, you did write a letter about Elco, you testified, is that correct?

A Yes.

Q So is the date on which the discussion of Elco took place July 9 or 10? It pretty much had to be one of those days, didn't it?

A The discussion on Elco took place on July 10, and the letter went out on July 10.

Q Now --

Q Because July 10 was the day we discussed it and the purchase was agreed to.

Q Then was it this letter of July 10 which enclosed the annual report of Elco?

A The annual report goes out in a separate envelope.

Q The annual report didn't go out to Mrs. Grupe before you discussed it with her, did it?

A The annual report went out the day I discussed it with her.

Q Which was July 10, you just testified?

A Right. I told her what I thought of the company.

Q The trade date on the purchase of Elco was July 10, wasn't it?

A Yes.

Q So on this day at least, with regard to this purchase at least, you didn't actually hand to her the Elco annual report and ask her to review it and ask questions before the trade was effected, did you?

A No. What I explained to her was that there were a number of tender offers that had already been made, that the company was due to be acquired, the tender offers had been made prior to that date. I sent copies --

Q You regarded the fact that the company was the target of tender offers at the time you recommended it to her as making it a safe investment for her?

A Absolutely. Absolutely. If people were willing to pay $15 million for just the common stock, I regarded the debentures as extremely safe. $4 1/2 million worth of debentures and the company had a ratio of 7 to 1.

Q July 10 you wrote her: "Dear Bea: As per conversation the Elco debentures are worth holding. The company is merging soon."

Let's come back, "the Elco debentures are worth holding." Why was it you felt appropriate to say the Elco debentures are worth holding the day you first discussed investing in Elco?

A Because I hadn't been able to sit alongside her to discuss it, so this was reemphasizing what I said to her and I had marked up a copy of the annual report and sent it to her; and in the letter I had included photostats of the Dow Jones clippings of the companies that were trying to buy Elco.

Q Does that phrase, "are worth holding," call to mind whether Mrs. Grupe asked you whether or not they were worth holding or indeed owning?

A No, Mrs. Grupe was talking about -- she said, "Gee, honey, be careful. My bank account is going low and I want to live a little."

Q That was the letter she wrote, about which we debated over the date, whether ir was July 16 or July 18?

A This was also a phone conversation and I said, "This will increase your income. One of the reasons for the purchase of Elco was to help to get up to $12,000 a year."

But also because I regarded it as extremely safe. Then and now.

Q The next part of the letter goes on, "The company is merging soon, will make the debentures even safer, since the assets of two companies would be behind the debentures."

What did you mean by the phrase, "since the assets of two companies would be behind the debentures"?

A Well, in one case there was a potential merger. A company wanted to buy, a company by the name of Microdot wanted to buy the stock and merge the companies, but the owners of Elco went into federal court to start an action against them, and they started an action against the second company, and the courts upheld Elco. Ultimately, it was sold to a subsidiary of -- ultimately it was sold to Gulf & Western.

Q I think we had read in earlier, but it might be worth repeating at this point, Exhibit 17. I will read this excerpt from the notice to the holders of Elco Corporation, dated July 3, 1974, reflecting the discussions with Elco, Incorporated, a subsidiary of Gulf & Western

Industry, in which it says, "Notwithstanding the merger, the holders of debentures will continue to be entitled to look only to Elco for payment of the interest and principle with respect to the debentures."

So it wasn't the fact, was it, that the assets of two companies were behind the debentures?

A When I said "the assets of two companies," I was referring to the tender offer by Microdot, but in this instance Gulf & Western paid $15 million and Elco had sufficient cash and money invested in short-term commercial paper that could have paid off all the debentures if they had wanted to.

Q And this made it an intriguing or interesting situation from your point of view?

A Yes, because the company had a ratio of 6 to 1. Their liquid assets could have wiped out all their indebtedness and left over fifteen to $20 million. And Gulf & Western paid $15 million just to buy the stock.

Q With regard to Seaboard Coast Lines, to which there was some reference, you regarded it as a high-quality stock?

A I regarded it as a good railroad.

Q You regarded it as safe for her to own for a short term?

A I regarded it as a good railroad to hold for a short term.

Q You said that you owned a thousand shares of it in inventory, and you offered that entire thousand shares to Mrs. Grupe, you testified. Is that correct?

A That's correct.

Q There was no other customer that you proposed this to before or after?

A No, we could have sold it right on the floor of the Exchange.

Q But of your customers, you selected Mrs. Grupe for the opportunity, is that correct?

A Yes.

Q You didn't ask Miss Emerson if she wanted to buy any of this issue?

A No, Mrs. Emerson didn't have $25,000 reserve. I knew she didn't have a $25,000 reserve and the question was whether we would offer it to a client because I thought a profit could be made or we could sell it right in the market. We could have gotten a higher price for it that same day.

Q Did it occur to you possibly to offer Miss Emerson, your friend of more than twenty-five years' standing, possibly a hundred or 200 of the shares and maybe the remaining 900 or 800 to Mrs. Grupe?

A No. We were thinking of just selling it as a block either on the market or to some client who might be interested in the concept that I had developed.

Q What was the reason that you thought that this was a worthwhile short-term holding?

I will withdraw the question.

What was the date on which that transaction occurred, if you recall, in which Mrs. Grupe, according to your testimony, authorized you to buy -- to sell her a thousand shares of Seaboard Coast Lines common stock, 1,000 shares for $25 a share, or $25,000? When?

A June 28. No, that's settlement date. June 21.

Q June 21?

A Yes.

Q You discussed it with her on June 21, is that correct?

A I believe it was June 21 or the evening of June 20.

Q When did Mrs. Grupe leave for Europe, if you know?

A June 24.

Q What day of the week was June 21? It was a Friday, wasn't it?

A If you let me look at a calendar. If you say it is Friday and you have a calendar --

MR. GOLDSTEIN: It was a Friday.

A All right.

Q So on Friday night, the day before, just before she departed for Europe --

A Not Friday night.

Q Excuse me, Thursday night?

A Either Thursday night or Friday morning.

Q You spoke with her Friday --

A Either Thursday night or Friday morning.

Q Either Thursday night or Friday morning you proposed this sale to her of a thousand shares of the common stock of this good railroad as safe for her, and asked her to send you $25,000. Is that right?

A We just sent a bill out.

Q But you knew she was leaving on Monday for Europe?

A Yes.

Q The settlement date was the 28th -- was a week later, wasn't it, the 28th of June?

A The last day would be July 2.

Q When was she due to return from Europe, did she tell you?

A I beg pardon?

Q Did she tell you when she was due to return from Europe?

A July 2nd.

Q So that you asked her on the 29th or the 21st of June to get up $25,000 and get it to you sometime during the period of time that she was in Europe, is that correct?

A No. At the time she returned.

Q On the day she returned from Europe?

A Right.

THE COURT: Incidentally, do you know if the stock fluctuated during that one-week period?

THE WITNESS: It went up, your Honor. On the day we sold it, the stock fluctuated between 25 3/4 and 25, but it closed at 25, so we billed it out at 25 without a commission.

THE COURT: When you sold out the sale after she failed to pay, what price did you sell at?

THE WITNESS: We didn't. We cancelled the trade, your Honor, and we put it back in inventory.

MR. BLUM: Your Honor anticipated my next question.

THE COURT: As of July 2, where did the stock stand, do you know?

THE WITNESS: It was selling slightly above the 25 price.

Q Did there come a time subsequently when your trading account sold, when John Lamula Investors sold it?

A Yes. We held it and about a month later the dividend was increased to 55 cents, and we held it for three more months, and we collected a second dividend, $550, and another $550, and then we decided to sell it because we needed the money for other securities, and we sold it at 28 5/8 and it went higher after we sold it. It went into the 30's. It acted as I anticipated it would have acted for that period of six months, which was what I had hoped would happen with Mrs. -- we wanted to take the loss, but I had hoped Mrs. Grupe would take the profit.

Q I see.

Mr. Lamula, I want to turn once again to the subject matter of your testimony this morning which related to the pricing of the debentures when you sold them to Mrs. Grupe.

I believe you testified -- and correct me if I am wrong -- that the -- and I am referring now to that set of document which is Plaintiff's 165 -- that the fact that Murphy & Durieu, for example, show bids from May 21 to May 24, which are 44, 49, 43, 48, 42, 47, 42, 47, does not bind them in the price that they quote when Mrs. Vena or you or anybody else calls them during that period of time. Is that correct?

A The price --

Q The fact that they are in the sheets --

A The price that binds them is the price that they give one when you call them.

Q Now, he --

A And it binds them to buy or sell five debentures.

Q The fact is, nevertheless, is it not, that on May 22 they put in the sheets, in the yellow sheets, 43-48, and they must have changed it on the next day, May 23, because it says 42-47, and then again 42-47 for May 24. So --

A Which issue are we talking about?

Q Murphy & Durieu, Allegheny Beverage. That seems to be fairly level. Did you, in fixing the price at 5 for Mrs. Grupe, regard there being nothing unusual about the difference between the yellow sheet price and the price that you indicate on your order ticket?

MR. GOLDSTEIN: I object to the question.

THE COURT: Sustained. Rephrase the question.

MR. GOLDSTEIN: There is one other point I would object to. The term "you."

Louis Lamula set the prices, and if by "you" he means --

THE COURT: As a matter of fact, I don't think it's ever been clearly noted who set the price. I happen to know that, having seen it in the deposition, but it hasn't been brought out during the course of the trial.

Q Then let's ask him. Who set the price?

A My brother.

Q Did you review the prices at any time?

A Yes.

Q What time? Was it within a day or two after these transactions occurred?

A Yes.

Q Was it on the day itself, in all likelihood?

A I don't know. It might have been the next day, but I checked the back of the blue tickets and also checked and initialed the blotter.

Q And also what?

A I initialed the blotter.

Q Did you look at the yellow sheets?

A I checked the back of the tickets.

Q Did you look at the yellow sheets for the relevant days?

A No. I checked the back of the ticket to see what the quotations were that had been gotten by our --

THE COURT: You are volunteering again, Mr. Lamula. The answer is you did not check the yellow sheets.

THE WITNESS: No, what I did --

THE COURT: He didn't ask you what you did do. He asked you what you didn't do.

Q Now, Mr. Lamula, please answer this with a yes or no. Are you familiar with Article 3, Section 5 of the Rules of Fair Practice of the National Association of Securities Dealers, which appears at the Commercial Clearinghouse book there at paragraph 21.55 on page 2071? I show you a copy of it and ask you if you are familiar with that. It is at the top of the page, Mr. Lamula.

THE COURT: Which number is this?

MR. BLUM: Section 5 of Article 3.

Q Don't read it aloud, but just tell us if you are familiar with it.

(Pause)

A Yes.

MR. BLUM: I shall read an excerpt from this rule before asking my next question, which relates to it.

"No member shall publish or circulate or cause to be published or circulated any notice or communication of any kind" -- and I am excerpting now -- "any notice or any communication of any kind which purports to quote the bid price or asked price" --

MR. GOLDSTEIN: Excuse me, your Honor, that isn't --

MR. BLUM: I am excerpting it, as I say.

MR. GOLDSTEIN: I don't have that.

MR. BLUM: You are looking at something else.

(Pause)

MR. BLUM: I am reading only the relevant portion.

"No member shall publish or circulate or cause to be published or circulated any notice or communication of any kind which purports to quote the bid price or asked price for any security unless such member believes that such quotation represents a bona fide bid for or offer of such security. If nominal quotations are used or given, they should be clearly stated or indicated to be only nominal quotations."

Q Now, Mr. Lamula, on May 23, John Lamula Investors itself was in the sheets for 42-48 as a bid and asked. With that rule in mind, I ask you: Was that quotation of 42-48 a bona fide quotation on the morning of May 23 when John Lamula Investors submitted it to the National Quotation Bureau?

A It was a quotation that we submitted that would be subject to change based upon any queries that came to us.

Q Was it bona fide at the time you submitted it?

A Yes.

Q Did you have any understanding, based upon that rule which I read, as to the bona fides -- that is, the good faith -- of Murphy & Durieu, or Wechsler & Krumholz, or indeed any other marketmaker, in putting its quotations in the yellow sheets for the day in question?

A I believe that the quotations they gave us over the phone were bona fides quotations as of the time we queried them or as of the time our office queried them.

Q Was it your practice, in light of the rule of the National Association of Securities Dealers, to ask them whether they stood by the bids or asked set forth in the yellow sheets on the day in question or the day before?

A Occasionally it is, and the answer that one is given is that their price has changed.

Q Did you review the price of each issue of debentures which was sold by your firm to Mrs. Grupe at or about the time that the trades occurred?

A I did.

Q Did you initial or approve them on the blotter?

A I did.

Q By "blotter," again, so that the jury understands it, what do you understand by the term "blotter"?

A It is a sheet that is used daily on which every transaction is recorded. We have a sheet for every day on which ever transaction, every purchase and sale, every check that comes in, every check that goes out, anything that happens on a particular day, is entered on a long sheet which we call a blotter.

Q As a matter of fact, the regulation of the SEC, Section 17(a), 3(a)(1), require a blotter to be maintained by you, don't they?

A Yes, of course. It is part of the rules.

Q As you reviewed these prices, which say your brother fixed, but which you reviewed at about that time, were you aware, or did you notice the difference, between the price your brother had fixed and the prices shown with respect to those debentures where there were quotations that had been in the sheets for those periods of days?

MR. GOLDSTEIN: Your Honor, I would object to the question. Mr. Lamula has already testified he didn't look at the yellow sheets, but just at the blue sheets.

THE COURT: True, but he could have become aware of the discrepancies by virtue of someone else telling him about it. Did someone call your attention to the fact there were wide discrepancies between the prices quoted on the blue sheets and the prices quoted by the same companies in the yellow sheets?

THE WITNESS: No. What I customarily do is check the back of the blue slip --

THE COURT: I understand, but did anybody inform you of the fact there were wide variations between them?

THE WITNESS: There have been occasions when Minnie would say I got such a differing quote that she would call back and say, "Your quote is wrong on this sheet, your quote is not in accord with the yellow sheets." He said, "What hellow sheets? My price today is so much."

THE COURT: Did she tell you this on this occasion with respect to these?

THE WITNESS: No, I am just answering your Honor to indicate there have been instances when they have been questioned.

Q Again, if I may, in the interests of speeding this, summarize, I believe it is fair to state in every one of these sales occasions, as indicated on Exhibit 165, when there was a quotation in the yellow sheets, the sales price to Mrs. Grupe was higher.

Was it a usual occurrence, in your experience, that the sales price would across that many transactions on a single day uniformly exceed the prices in the sheets?

A It happens frequently both ways. Sometimes it is higher and sometimes it is considerably lower because of some events that may happen, and I related earlier where we bought 50 bonds at a given price and then found out fifteen minutes later that they were only worth -- we paid $50 apiece and they were only worth 20 because of some news that had come out ten minutes before we bought them.

Q But we have a roughly comparable base to make a comparison. In Exhibit 166, which deals with the sales by L. F. Rothschild of these debentures, an even greater number of them on August 6 and August 7, and there, as you may have observed, some of them were at lower than the --

A Let's see what Rothschild did.

Q Some of them were at lower than bid price, some were at the bid price, and some were higher than the bid price. Do you regard that as usual?

A May I see the Rothschild list?

Q Yes.

(Pause)

THE COURT: I think if you really want to get the statistics, it comes down to one of them was above the yellow sheet price, three were 2 or 3 points below, and the remainder were at or within 1 point of the yellow sheet price.

MR. BLUM: Yes.

THE WITNESS: Your Honor, DWG, there was a $450 bid. DWG, five bonds were sold at 440, five were sold at 450 and five sold at 410.

Q That is not quite correct, because if you will note on that sheet there were no bids in the sheets on DWG from April 30 until December 31.

THE COURT: You can't use DWG as it is not on the sheets.

MR. BLUM: You can't really deal with that one.

Q Take a look at Applied Data. John Lamula Investors was bidding 500 at the time and Rothschild dumped all of those bonds, as you call it, at 550.

A And the people who bought them at 550 sold them to the company at 650.

Q We don't know that, do we?

A I do know it, because the company was buying them at 650.

THE COURT: That is not the question. Confine yourself to the question asked.

Q I am trying to determine whether this pattern which has been observed with regard to the pricing of these debentures to Mrs. Grupe was a usual pattern, and the only thing we have before us in evidence to go on is what happened when L. F. Rothschild sold, and I am asking you whether you regard what you experienced as more typical than what they experienced.

A I wouldn't have done what Rothschild did.

Q That wasn't my question, Mr. Lamula.

A What is your question, sir?

Q My question was, is the pattern, as the Judge described it, of one or two above, one 3 points below, and most within a point range of the bid price in the sheet, a much more usual set of transactions and sales?

A Those prices are 30 percent below.

Q Below what?

A Below the prices they were purchased at.

Q Were they below the prices in the sheets?

THE COURT: That is not the question he is asking you, and perhaps you are having difficulty understanding his question, and if so, I will rephrase it for you.

We start with your stated belief that the prices that the marketmakers will actually quote will differ somewhat from that in the yellow sheets.

THE WITNESS: Yes, your Honor.

THE COURT: And indeed the Rothschild sales to some extent bear that out. There are ten or eleven Rothschild sales. Let me count them. There are eleven Rothschild sales as to ten of which there are yellow sheet prices, one of which there isn't, and we will forget that.

MR. BLUM: I believe two. Nortek also, if recollection serves, was not quoted at about that time.

THE COURT: Let's look that up. I think I was right the first time.

MR. BLUM: Yes, you are right. That's the only one.

THE COURT: In comparing the prices that Rothschild actually sold as against the yellow sheet bid prices, we find that in six instances the price is either the published price or within 1 point of it. In one instance it is substantially above it. They have got 5 points higher. In three instances they sold for 2 to 3 points below.

Now, the question to you is: In terms of deviation from published yellow sheet prices, does that appear to be a fairly random sampling of what you would expect?

THE WITNESS: Yes. With this addition, your Honor: that at this particular point, those prices were so extremely low that you couldn't expect the kind of deviation that we had. They were comparatively rock bottom and they were thrown away.

THE COURT: You are saying at the time this occurred, this was a reasonable distribution, relatively little variance, but you say at the time you purchased for her, or rather purchased for your account prior to selling to her, the market was less stable?

THE WITNESS: Less stable. And in this instance, your Honor, there wasn't any possibility -- these were at such rock bottom prices that the people that got these debentures really reaped a bonanza.

THE COURT: Next question.

Q You had testified before when I was asking you about these various debentures that you thought that they had gone about as far as they could go -- that is, downward. But according to what you have just said, it does appear that you were incorrect, doesn't it, and that they went a little lower before they turned the corner, isn't that right? They were lower in August of 1974 than they were in May?

A They were lower in August of 1974.

Q Because of its length, I don't wish to read it in; but are you familiar with Section 4 of Article 3 of the Rules of Fair Practice of the National Association of Securities Dealers and the interpretation which its Board of Governors has issued, that is, the section which relates to fair prices and commissions and what the Board of Governors calls interpretations of markup policy? Without reading it, I just want to be sure you are familiar with it.

A Yes, I am familiar with it.

Q And does your firm and do you and your brother guide yourselves in determining markup by the policy as enunciated in Section 4 and as declared in the interpretation of the Board of Governors?

A Very much so. Very much so.

Q What do you regard as the markup on Allegheny Beverage?

THE COURT: He answered this question earlier. He said he didn't consider that he had a markup since he was selling from inventory and an appropriate markup, if there were a markup, wouldn't exceed 5 percent. He so testified earlier, I believe, in answer to questions I asked him. Am I correct, Mr. Lamula, that is your testimony?

THE WITNESS: You are right, your Honor.

MR. BLUM: I will withdraw the question, but I will ask this:

Q In approving the price which your brother determined with regard to each of these, did you or did you not take into consideration the price which John Lamula Investors had paid one or maybe two days earlier for the same debentures?

A No. No. We had --

THE COURT: That answers the question. You don't have to add anything else.

Q Was your reason for that your expectation that the price might fluctuate a great deal from moment to moment or from day to day?

A It happens frequently.

Q Was that the reason that you did not regard your acquisition cost as relevant?

A Our acquisition cost was several days before, and we had the securities in inventory. Anything could have happened overnight or during the two-day period that would have completely wiped out the price of any of those securities. If somebody -- if a suit had been started and trading had been stopped, we wouldn't have been able to sell those securities or the market might have fallen completely out of bed.

Q Let's look at what actually did show itself in the yellow sheets for those days. Again I refer to Exhibit 165. Is it not a fact that the Murphy & Durieu, Wechsler & Krumholz and Carl Marks & Co. prices, as well as the John Lamula Investors price stayed pretty much stable across those four days?

THE COURT: You are talking about all of them collectively?

MR. BLUM: Yes.

THE COURT: Except Nortek, which went up?

MR. BLUM: I am talking just about Allegheny. As a matter of fact, I don't think there was any significant movement.

THE COURT: The only one which had significant movement was Nortek.

Q So with the exception of Nortek, then, did you regard it as significant that there wasn't any meaningful movement -- withdrawn.

Did you regard it as significant that there wasn't any substantial movement in the quotations which appeared on those where there were quotations across that whole four-day period?

MR. GOLDSTEIN: I object to the question.

There has been testimony that Louis Lamula set the prices, that Mr. John Lamula did not look at the yellow sheets.

THE COURT: Sustained. He so testified.

Q What office does John Lamula hold in John Lamula Investors, Incorporated?

A President.

Q And that is Louis Lamula?

A Vice president.

Q The two of you are the only two who are registered with the NASD in your concern, isn't that correct?

A I beg your pardon?

Q At this time, in the spring of 1976, you and your brother Louis were the only employees of John Lamula Investors who were registered with the NADS, isn't that correct?

A We were the only two active employees. We had several inactive employees, the record is clear, who were registered.

Q I jotted down the question asked of you by Mr. Goldstein this morning in which he said, "Then the main purpose for going into the yellow sheets is to show you were a marketmaker in that item, is that right?" I believe that is an exact quotation. And your answer was, "Yes."

Is that true even when a price is quoted in the yellow sheets? Is it true even when there was a quotation inserted in the yellow sheets?

A Yes.

Q Let's go back a step. A concern can indicate that it is a marketmaker simply by submitting the card without quotations to the National Quotation Bureau, can it not?

A Yes. Burnham does it on several hundred issues.

Q They just put in a ticket which says: We are a marketmaker?

A Without price.

Q When they put the price in --

A They don't put it in.

Q When they do put a price in, as Lamula did in Allegheny, 43 to 48, what was the reason for doing it?

A Hoping to get inquiries.

Q As regards 43-48?

A As regards any price. We might very well have purchased Allegheny at 50 or 52, if we got a sufficient block.

Q Are you saying then that that was not a bona fide quotation inserted in the sheets?

A No, what I am saying is that was our quotation, and if somebody sold it to us at that price, but Merrill Lynch came in and said, "We have 50 bonds to sell," but we want 52, if we wanted it bad enough we would pay 52.

Q But if someone from Merrill Lynch called -- the market opens at 10, doesn't it?

A Right.

Q If someone from Merrill Lynch called at one minute past 10 and said, "I see you are in the sheets for 43-48, will you quote for me," would you feel that it was a proper quotation for John Lamule Investors in Allegheny on May 22 to quote 50-55 or 55-60?

A Yes, if we thought it was worth 50-55 on that day.

Q You testified earlier that if you had done this on a commission basis -- that is, as a broker -- rather than as a dealer for your own account, your charge would have been $10 a bond.

A That is correct.

Q Have you reviewed the confirmation slips which I think are collectively Exhibit 45, of L. F. Rothschild, to determine what price L. F. Rothschild charged per bond, when it sold them, as commission?

A L. F. Rothschild charges $5 a bond. There are many houses that charge $10 a bond. As a small house, we have to charge at least $10 a bond in order to be able to --

Q The answer is 5, isn't it?

A I beg pardon?

Q The answer is 5?

A And there are some 7 1/2 and others at 10.

THE COURT: Why is it important? He has taken the position he didn't sell them as a broker and wasn't entitled to commission but was entitled to a profit.

MR. BLUM: I think your Honor is aware of the affirmative defense which has been made.

THE COURT: You are trying to establish Rothschild sells for a lesser commission?

MR. BLUM: I am trying to establish the charge to Mrs. Grupe would have been less by dealing with L. F. Rothschild in the selling of the bonds than if she had dealt with the John Lamula Investors.

THE COURT: You said before a half hour and you have been over forty-five minutes.

MR. BLUM: I am sorry, your Honor.

Q I want to come back to the letter of May 24. Perhaps that is an appropriate place to conclude this.

This letter, which you say you sent to

Mrs. Grupe, Plaintiff's Exhibit 17, which you read to the jury. You talked about spreading her money among ten issues. Did you regard that as a diversification of Mrs. Grupe's investment funds?

A Very much. These were companies all over the country and in different industries and each had its own potential. I regarded it very much as a diversified portfolio.

Q Didn't they all fall within the category commonly known -- didn't they all fall within the category commonly known in the industry as junk bonds?

A No, Mr. Blum, and I explained what junk bonds were and you are being unfair in asking that question.

THE COURT: Yes, he did explain.

A You know what junk bonds are.

Q There will be some testimony about that again.

There is another passage here, "This means you have $170,000 in face value for an investment of $96,600, and an income of $10,762.50 a year."

A Right.

Q Did you or didn't you regard that sentence as misleading when you wrote it to Mrs. Grupe?

A Absolutely not. Absolutely not. How dare you?

THE COURT: That's enough, Mr. Lamula.

A You asked me that question and I --

THE COURT: Mr. Lamula, please, you have answered the question. Don't volunteer anything more. Put your next question.

You know, Mr. Blum, you invite some of this volunteering by the long pause between questions.

MR. BLUM: Your Honor, I think I'll terminate my questioning at this point.

THE COURT: Very good.

Redirect examination.

REDIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Mr. Lamula, can you define for us the term "depreciation" and what it means?

A Yes. If a company makes $1 million gross profit, from that $1 million they have to pay this much for salaries, and they have to pay this much for their inventory, and they have to pay this much for all their other expenses, they have to pay interest on bank loans, they have to pay interest on their debentures.

Then they deduct depreciation, which in the case of some of these companies, amount to $2 1/2 million. And that depreciation amounts to this much, but doesn't go anywheres, it stays in the company. This is out the window, all this other money. This is the net profit. But what stays with the company is the net profit and the depreciation. They pay taxes on this net profit but they don't pay taxes on this depreciation. Depreciation is the amount of money that the company is permitted to take to depreciate their machinery or other materials and the money stays with the company.

Q There was some discussion about stock dividends. In the case of these companies, would you consider it good or bad for the debenture holder if the company paid a cash dividend, and your reason for that statement?

A If it were possible, the most preferable type of debenture to buy would be one where the company pays a stock dividend on its stock, because by doing that when they have agreed in the first instance -- when you lend them a thousand dollars and they have agreed to permit you to change that to stock at $10 a share, when they pay a stock dividend, that $10 price must be lowered. As an example, in the area of DWG, when their debentures first came out, the conversion price was something like $12.75, and because of the stock dividends they have been paying, the conversion price has been reduced to $8.75.

Now, in the case of a company that is making money and doesn't pay a dividend on the stock, that money stays in the till, it stays in the bank, and the debentures are that much stronger because there is that much more in assets.

Q Now, Mr. Lamula, the Court observed that there was a price fluctuation in the sheets as regards Nortek around May 22. Was there a reason that you know of for that price fluctuation?

A Yes.

MR. BLUM: I think the witness already testified to the reason.

THE COURT: I believe he did.

Q You have already testified about it, and I believe you stated that they were going to purchase some of their bonds. Did they in fact shortly after that announcement come out and purchase the debentures?

MR. BLUM: I object.

THE COURT: I will allow it.

A Nortek announced they were going to buy $500,000 worth of their debentures and put them into the sinking fund. They did buy the $500,000 worth of debentures. Some they tried to buy in the market. They know the owners and they succeeded in buying $500,000 worth of debentures for $377,000. That means that they paid an average of $750 per debenture.

MR. BLUM: May I request the witness be limited to the answer to the question?

THE COURT: All right. Next question.

Q They paid $750, I believe you said, for each bond?

A Yes.

Q Did that result in a benefit to the company?

A Yes. When they buy in bonds below the thousand dollar figure, the different is considered a profit. That goes into the profit column. They retired $500,000 worth of debentures. They only paid $750 apiece so they considered the difference a profit of $250 on each bond.

MR. GOLDSTEIN: Since Mr. Blum brought in the NASD manual, I would like to read from Article 3, Section 6.

THE COURT: Do you want to put it in evidence first or are we treating it as being judicially noticed?

MR. GOLDSTEIN: I think it can be judicially noticed, but I would like to read it.

THE COURT: I will take judicial notice pursuant to your joint request of the NASD rules, and you can now read into the record any portion of them you wish to.

MR. BLUM: May I makd the suggestion, hoewver, that since you have a witness waiting outside, perhaps timewise it could be read tomorrow.

MR. GOLDSTEIN: I could read it if you agree we don't need Mr. Lamula to state whether --

MR. BLUM: I don't know what your question is.

MR. GOLDSTEIN: I would just read it.

THE COURT: Give us the title. What section?

MR. GOLDSTEIN: Article 3, Section 8.

THE COURT: Dealing with what?

MR. GOLDSTEIN: Offers at stated prices. Particularly I would read the policy of the Board of Governors which follows that section.

THE COURT: You don't need him on the stand to read that. You can read that later.

MR. GOLDSTEIN: All right.

THE COURT: Incidentally, I don't think you ever made clear to the jury exactly what the National Association of Securities Dealers is, and I think it may confuse them a bit if they don't understand the workings of it.

Mr. Lamula, will you tell the jury briefly what the National Association of Securities Dealers is and what it does.

THE WITNESS: Yes, your Honor.

There is a top agent that governs security transactions and registrations called the Securities and

Exchange Commission in Washington.

THE COURT: That is government.

THE WITNESS: That is government. The Securities & Exchange Commission authorized way back in the 1930's after they came into existence to allow an organization within the industry but under their supervision to regulate the over-the-counter markets, and it is called the National Association of Securities Dealers. Everyone dealing in securities must join that organization, and that means Merrill Lynch, and it means Bache, it means every stock exchange firm, and every over-the-counter firm, must become a member of that organization before they can do business. They must be approved by that organization. They must meet certain capital requirements. And they are supervised. In effect, it is an arm of the SEC.

THE COURT: Well, it is industry self-regulation.

THE WITNESS: It is an industry policing organization.

MR. BLUM: I will accept his statement --

THE COURT: It is industry self-regulation just as the Bar Association is regulation of the attorneys by themselves, and just as there are other industry groups that regulate. It happens this is a highly regulated industry by the SEC and consequently they hang over the NASD shoulder closely.

THE WITNESS: They are on top of them. They work closely with the SEC or the SEC is closely on top of them.

THE COURT: As part of this, the NASD publishes various rules from time to time and the Board of Governors make explanations of rulings to guide their members as to what they should do.

THE WITNESS: Yes, your Honor.

THE COURT: Now the jury has been told. Continue.

Q There was some discussion with Mr. Blum about Allegheny and preferred stock. How many classes of preferred stock did Allegheny have at that time?

A There were three classes of preferred stock. Besides the common stock, they have an A, B, and C.

Q Could you tell us what each of those classes -- strike that.

Could you tell us something about those classes of preferred stock in the spring of 1974 vis-a-vis dividends and the right to receive dividends?

A When the A and B stock was issued, there was a provision in the circular that required no dividend payments. That is part of the provision in the issuance of the A and B stock, and 100 percent of the A stock, consisting of 260,000 shares, is owned by the president of the company, Mort Lapidus.

The C preferred stock has always paid a dividend, and the common stock has paid a stock dividend all the way back to 1970, and I believe before that.

MR. GOLDSTEIN: I have no further questions of this witness.

MR. BLUM: No questions, your Honor.

THE COURT: You are excused, Mr. Lamula.

Call your next witness.

(Witness excused)

ROBERT L. LOEB, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Mr. Loeb, in August 1974 were you associated with L. F. Rothschild & Co.?

A Yes.

Q In what capacity?

A I am resident partner of the uptown office of L. F. Rothschild.

Q In August 1974, did you meet Mrs. Grupe?

A Yes.

Q Was that the first time you had met her?

A Until today.

Q You had not met her before that date?

A No.

Q Do you remember the exact date you met her?

A No, but I can look it up, if you would like.

Q Please do.

(Pause)

A On the 6th of August.

Q That was on a Tuesday?

A I don't recall.

MR. GOLDSTEIN: I think we can stipulate to that

Q Are you positive it was not August 5?

A The basis of my answer was that the securities which Mrs. Grupe brought in at our only meeting, according to our records, were received on the 6th. That is the only basis on which I gave the answer.

Q You came down pursuant to a subpoena issued by our office, did you not?

A Right.

Q Pursuant to that subpoena, did you bring down Mrs. Grupe's account card?

A Yes.

Q May I see that, please?

A You can see it only on the advise of counsel.

MR. BLUM: Please deliver the cards or whatever records there are. If he offers anything in evidence, we can deal with that at this time.

I do think it is appropriate, your Honor, if I may at this point, to say that of course I have discussed this with Mr. Loeb and this refers to a question which has often been before this Court in and out of the presence of the jury as to how far past the dates in question investments made for Mrs. Grupe's account are relevant, and I just wanted, so that the jury won't be wondering what the mystery was, to reserve my right to make objections if questions go beyond some time limit.

THE COURT: All right. Put your next question, Mr. Goldstein.

Q Now, is there any date on this account card by which we could tell when it was made out?

A No. That card is made out for our own records.

Q Is there any card that Mrs. Grupe signed on that date -- strike that.

I believe Mrs. Grupe testified that she had signed at your office a receipt when she gave you the debentures. Do you have that receipt with you?

A No. We gave her a receipt. I do not have a copy of it with me.

Q You don't have a copy?

A No. A receipt for each security.

Q Who made out this card?

A A young woman named Toni L. Katz, who is a registered representative and at the time was my assistant.

Q Did Mrs. Grupe sign any document on that first date which you have in your records?

A I don't believe so.

Q Have you checked through your records carefully?

A Yes.

Q And you haven't found such a document?

A No.

Q How did Mrs. Grupe come to meet you? Did she just walk in, was she referred?

A She is the niece of a client of mine named William --

MR. BLUM: I think we can stipulate she is the aunt, not the niece.

A Excuse me. She is a relative of a client of mind, William Morris, who is president of Mid-Atlantic Consultants. They are investment advisers who are clients of mine.

Q And he referred her to you?

A Yes.

Q Did you arrange the initial meeting with Mrs. Grupe or did you arrange it through Mr. Morris?

MR. BLUM: Objection. It hasn't been established this witness arranged that meeting.

THE COURT: Reframe the question.

Q Was the original meeting with you, however arranged, made with Mrs. Grupe or Mr. Morris?

A To the best of my memory, it was with Mr. Morris.

Q Mrs. Grupe came in to see you approximately at what time on August 6?

A I have no idea.

Q Would you have a diary which would reflect that?

A No.

Q You don't keep a business diary?

A Not that detailed or precise. I have a great many people in and out of my office during the course of a day.

Q Do you recall how long you spent with Mrs. Grupe that first meeting?

A On the first and only meeting, I spent almost no time with her. We exchanged a very few words. I turned her over to Miss Katz to fill out a new account form and to arrange for the receipt of the securities.

Q When you say "almost no time," approximately how long is "no time"?

A Two minutes.

Q Now, during those two minutes, did you say anything to Mrs. Grupe or did she say anything to you?

A Yes.

Q What was the gist of the conversation, if you can remember it?

A I don't remember very much about it. I do remember her showing me the securities. I believe I indicated that they were not necessarily the best thing she could have had. She instructed me to sell them. And she said that her nephew would be issuing instructions in the account, and she asked me if I knew of a good lawyer and I said I knew a crackerjack.

Q And who was that crackerjack?

A The young fellow sitting down there.

Q So you referred Mrs. Grupe to Mr. Blum?

A I didn't really say "crackerjack."

Q You referred Mrs. Grupe to Mr. Blum?

A Yes.

Q This whole conversation took place within about two minutes?

A Yes.

Q Had you previously reviewed the debentures in question?

A Yes.

Q You personally?

A My staff and I.

Q But had you reviewed each one, you yourself?

A Yes.

Q Your testimony was that these weren't the best issues you could have bought, I believe, is that what you said?

A I would like to withdraw that testimony. Again, that was perhaps a superficial comment. I indicated they were most inappropriate for her, certainly at that time they were what we regarded as junk bonds, and I indicated in my opinion they should be sold.

THE COURT: I don't understand how you could have reviewed these securities in advance if you didn't see them until she brought them in.

THE WITNESS: I didn't see them physically, Judge.

THE COURT: Somebody had told you what she was holding?

THE WITNESS: Yes. I had obtained this from Mr. Morris.

THE COURT: He had advised you a day or two in advance as to what was involved?

THE WITNESS: Yes. May I?

THE COURT: Yes.

THE WITNESS: Mr. Morris had called me and indicated that his aunt had invested in these securities over a small over-the-counter dealer, that she seemed to have been had, and what did I think of these securities. She at that time, according to him, did not know that he was an investment adviser himself --

MR. GOLDSTEIN: I would object to that.

THE COURT: Confine yourself to how you knew what securities she held.

THE WITNESS: In any event, she had obviously given him a list. He asked me would I look them up and give him an opinion on them. It is an area in which my firm had some particular competence.

THE COURT: Did he give you a physical list, a written list, or did he just recite them over the phone to you?

THE WITNESS: I should think it was done over the phone, Judge. You see, I am really serious in saying that it wouldn't have been done with me, it would probably have been done with his secretary giving them over the phone to Miss Katz. That would have been the normal procedure.

THE COURT: In any event, there was a telephonic communication in which Mr. Mor is advised your firm of the securities held at that time by Mrs. Grupe so that when she came in later with them, you already had an opinion concerning them?

THE WITNESS: Both their quality and their marketability.

THE COURT: All right.

Q Did you keep a written memo of the conversation with Mr. Morris' office?

A No.

Q Did Mr. Morris discuss with you his aunt's age?

A Yes. Roughly.

Q Did he discuss her financial situation?

A Yes.

Q Did he tell you how much money she had in the bank?

A No.

Q Did he tell you how much income she was getting from any retirement plan?

A No.

Q Did he tell you what other securities she owned?

A No.

Q So you didn't know too much about her financial background at that point?

A I disagree with that conclusion. You are not asking the questions right.

THE COURT: He was making a conclusion, but there was no objection to it.

MR. BLUM: I didn't see any point to objecting.

A If I may say --

Q Please, Mr. Loeb, answer questions.

A Sorry.

Q At this meeting, did you tell Mrs. Grupe what sort of securities you thought she should be investing in?

A The initial discussion was directed only to the purxhase of some U.S. Treasury notes as part of a portfolio, and that Will Morris would make decisions as to the balance of the portfolio.

Q Did you mention anything, to the best of your recollection, about AAA bonds?

A U.S. Treasuries or AAA.

Q Just U.S. Treasury. Did you use the term "AAA"?

A Very possible. I don't recall. You know, it's been two years now. I wasn't on the stand.

Q Did you advise her to buy anything less than AAA?

A In bonds?

Q In anything.

A I didn't advise her.

Q Did you tell her that she might be well advised to invest in anything else other than U.S. Treasuries?

A No.

Q And you are sure you used the word "U.S. Treasuries"?

A I am pretty sure. I repeat, it's been two years.

Q OK.

Now, what did Mrs. Grupe say to you during this short period of time you were with her?

A I really don't remember. I think we exchanged pleasantries.

Q But you remember she asked you if you knew a lawyer?

A Yes.

Q Did she say what kind of alwyer did she need?

A I was already aware.

Q Did she say what kind of lawyer she needed?

A I don't know.

Q Did she mention what kind of legal problem she wanted handled?

A I don't remember.

Q But you recommended Mr. Blum to her?

A Yes.

Q What was the purpose of having her come to meet you in your office?

MR. BLUM: Again, I think it has been testified that Mr. Morris arranged it.

THE COURT: Yes, it has.

Q I mean purpose to see you.

A I did not have her come to meet me.

Q Excuse me?

A I specifically did not have her come to meet me, Mr. Goldstein.

Q I see. So you were not going to handle her account?

MR. BLUM: I think that is a conclusion that doesn't follow from anything that has been testified.

Q Were you going to be her account representative?

A Mr. Goldstein, I do business for a number of

Mr. Morris' clients who also do business with other brokers at his direction. The matter of whether or not I was going to be her account representative was not discussed in any manner.

Q That doesn't answer the question, Mr. Loeb. Were you going to be her account representative, yes or no?

THE COURT: Why don't we put it in a different fashion. When investment advisers bring business to you, are they assigned account representatives or do you simply deal through the investment adviser?

THE WITNESS: I deal through the investment advisers.

THE COURT: I think we will terminate for today. It is 5 o'clock.

The jury may be excused. Again I admonish them not to discuss the case. I understand the witness has a small problem concerning tomorrow morning.

MR. GOLDSTEIN: There is no problem with that, if he is back by 11.

MR. BLUM: I understand Mr. Goldstein intends to ask some questions of Mrs. Grupe, and we have an understanding, if the Court approves, that to convenience Mr. Loeb, Mrs. Grupe's testimony would be taken and then he would resume the stand at 11.

THE COURT: All right. You are due back at 11, Mr. Loeb, and we will take somebody else in between.

THE WITNESS: Thank you very much.

THE COURT: The jury is due back at 10, however.

(Jury excused)

(Adjourned to November 4, 1976, at 10:00 a.m.)

BERNICE C. GRUPE

- against -

75 Civ. 2083

JOHN LAMULA INVESTORS, INC.,
and JOHN J. LAMULA

New York, New York
November 4, 1976 - 10:15 a.m.

- - -

(Trial resumed)

(In open court; jury not present)

MR. BLUM: Later this morning, your Honor, I will have the official handbook of the AICPA, which promulgates their definitions of accounting procedures, and the definition which they promulgate of depreciation.

(Off the record)

MR. BLUM: I was advised last night immediately following your Honor's departure form the courtroom that Miss Emreson has apparently stopped by Lourdes on her way to the doctor's yesterday and made a miraculous recovery, and lo and behold arrived in New York City last night.

THE COURT: I understand. I also understand Mr. Goldstein is only going to ask her three or four questions.

MR. BLUM: I cann't but feel, and I say this with respect to Mr. Goldstein, that I have been had on this one. I have at every turn asked him for information, and I find it -- not that I doubt what he has told me, but my credulity is strained on the recovery and condition of this lady.

THE COURT: That has to do with her unwillingness to ccoperate with you and it is something you can bring out on cross-examination. He has advised you all along he would get her here if he could. He couldn't tell you whether he could or not.

MR. GOLDSTEIN: As long as Mr. Blum put the statement on the record, I would like to advise the Court I told Mr. Blum repeatedly while I did not know whether she would appear, it was most unlikely she would appear for his case, since she is an ill woman and couldn't stay for three, four or five days, that she would come in, testify and leave.

MR. BLUM: I was also told it was unlikely she would be here.

MR. GOLDSTEIN: That's right.

MR. BLUM: If I had known she would be here, then I might --

THE COURT: What would you have done differently?

MR. BLUM: I would have asked the Court to let her be taken on a day for both sides with the stipulation of counsel so we could have asked her questions and they could have asked her questions.

THE COURT: She is here, and you can do it. I already told Mr. Goldstein if you want to adopt her as your witness and go into topics he doesn't cover, you can do so.

MR. GOLDSTEIN: For the record, as Miss Emerson will testify, she first got the OK from her doctor yesterday afternoon to appear.

THE COURT: We are making too much of this. Bring the jury in.

(In open court; jury present)

THE COURT: Good morning, ladies and gentlemen.

This morning one of the attorneys, I won't tell you which one, had some difficulty in traffic, so that caused this delay.

We are going to call a witness out of turn now, I understand.

MR. GOLDSTEIN: Yes, your Honor.

According to the stipulation I made yesterday, I am going to examine Mrs. Grupe now, but I will want to recall her after I finish my examination of Mr. Loeb. That was my original intent, to call Mr. Loeb first and then Mrs. Grupe.

THE COURT: Let's use the time up by starting with her now.

BERNICE C. GRUPE, the plaintiff, called as a witness by the defendants, having been previously duly sworn, was examined and testified as follows:

THE CLERK: I remind you that you are still under oath.

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Mrs. Grupe, when you went to the airport on June 24, you met your nephew, Mr. Morris, is that correct?

A Yes, sir.

Q You told him at that time that your investment adviser or broker, Mr. Lamula, had increased your holdings from 100,000 to 170,000 in a matter of weeks?

A Yes, sir.

Q Subsequently, you came back from Europe on July 2?

A Yes, sir.

Q And I believe you testified you went up to Albany and then over to your home?

A Yes, sir.

Q When after you got home did you have your sister and her husband over for dinner?

A I believe it would have been the second week after I got home because -- wait a minute. It would have been the second week because Miss Emerson and her friend visited me that first week. If I have -- if I recollect the date correctly.

Q Prior to that time, had you spoken to William Morris, between the time you got home and the time of this dinner?

A No, sir.

Q Now, what business is your brother-in-law in?

A He is an engineer.

Q And just he and your sister were over for dinner that night?

A Yes, sir.

Q And at that time you showed them the list of securities you had bought?

A Yes, sir.

Q And you gave your brother-in-law a copy?

A Yes.

Q Would it be correct to say this dinner happened around July 16, July 17, someplace around there?

A I told you as accurately as I can remember.

Q About two weeks after July 2?

A Within approximately a two-week period.

Q OK. Now, when did your sister get back to you just prior to your going to the Buffalo library with her?

A Approximately two days.

Q Two days later. To the best of your knowledge, does your sister have any unusual expertise in the securities area?

MR. BLUM: Objection.

MR. GOLDSTEIN: I will withdraw the question.

Q Does your sister, to the best of your knowledge, have any more -- did she at that time have any more knowledge of the workings of the stock market than you did?

MR. BLUM: Again, I think the question is improper.

MR. GOLDSTEIN: I am asking to the best of her knowledge.

THE COURT: I will ask the question.

What knowledge, if any, did your sister have of securities?

THE WITNESS: The only thing I heard her mention was Treasury bonds.

THE COURT: She is familiar with Treasury bonds?

THE WITNESS: That's the only thing I heard her mention1 Familiar, I couldn't tell you how expertise she was.

THE COURT: All right.

Q. She came to you before you went to the library and what did she say to you?

A No, sir, she did not. I went to her house.

Q You went to her house?

A Yes, sir.

Q On a social visit?

A Yes, sir.

Q She had not called you to come over?

A No, sir.

Q When you got there, what did she say to you with regard to the securities?

A She said the family was very concerned that I was in inadequate and insecure securities.

Q Now, she is the mother of William Morris, is she not?

A Yes, sir.

Q Then you went to the Buffalo library?

A Yes, sir. The next day.

Q The next day?

A Yes.

Q Was that at her suggestion?

A I wouldn't remember whose suggestion it was. We decided we would go where we could find a Standard & Poor's and a Moody's, and that would be a library.

Q Who first mentioned about Standard & Poor's and Moody's?

A I believe my sister did.

Q And what did she say about them?

A That the ratings of my bonds were not -- well, we didn't know what the ratings were, but it didn't look like they were very good.

Q She did not tell you what they were?

A I don't think she knew.

Q What exactly did she say about the ratings?

A "Ratings" per se, I do not remember were discussed. The fact that none of the securities were listed on any of the exchanges or anything was one of the concerns, I remember.

Q That she told you about?

A She would have to, yes.

Q She told you the family was worried because they weren't listed on any of the exchanges?

A They were worried about the quality of the bonds, period.

Q That is not the question, Mrs. Grupe. Did she say they were worried because they weren't listed on any of the exchanges?

A A statement was made they weren't listed on the exchanges. Yes, that statement was made.

Q Did she say that was one of the causes of concern of the family?

A I do not remember.

Q Is it possible that's what she said?

A I said I do not remember.

Q Let's just understand. She said -- you don't remember exactly if ratings were mentioned?

A No.

Q But you remember pretty much that she mentioned Standard & Poor's?

A Yes, sir.

Q Did she say what Standard & Poor's were?

A Yes, sir.

Q What did she say?

A Not in definition. I believe I have already testified that I had another nephew who was in finances who would have been familiar with the term.

Q But did your sister tell you what they were?

A Yes.

Q What did she say?

A That was a place where we could look up and find out the quality of my investments.

Q In other words, she suggested that you and her go to the library and check on the quality of the investments?

A We agreed to.

Q And then you went?

A Yes, sir.

Q And you pulled the books out of the library and looked at them?

A No, sir.

Q Well, you took them off -- somebody gave them to you off the shelves?

A Yes, sir.

Q The librarian?

A Yes, sir.

Q How long did you spend in the library looking at these volumes?

A To the best of my recollection, it would have been a couple of hours.

Q And then you left with your sister?

A Yes, sir.

Q Did you go directly home?

A We might have stopped for lunch. I don't remember.

Q Subsequently you went home?

A Yes, sir.

Q How soon after that did you call your nephew, William Morris, and tell him you were coming to New York?

A Probably the same afternoon, or the next morning.

Q What exactly did you say to him, if you remember, on the phone?

A That I was concerned about the quality of my investments and I was coming to New York to find out about them.

Q Did you tell him you were coming to New York to sell them?

A No, sir.

Q You didn't say that to him?

A No, sir.

Q How soon after that did you come to the plane to come to New York?

A I don't remember exactly, but it was the first plane.

Q Was it the next day?

A I am quite sure it was the next day.

Q Did your nephew make reservations for you at the Hilton?

A No, sir. I think I made them myself. I have a travel agent.

Q Did your nephew meet you at the airport?

A No, sir.

Q At one point you said you had asked your nephew to get you the value of your securities.

A That's right.

Q You called him up at about -- what time did you call him, I believe it was Friday morning, August 2?

A I made arrangements the night before he would call me ten minutes after 10, after the stock market opened.

Q And he would give you the values of your securities as of that morning?

A Yes, sir.

Q And did he?

A Yes, sir.

Q Do you know if he used a, what's commonly called a Nasdaq machine, to get the quotes for you?

A I know he has a machine. The name I wouldn't know. A computer he had. I couldn't be specific. I don't know.

Q And that's what he used to get the quotes?

A I said I didn't know.

Q OK. Subsequently, he advised you to see Mr. Loeb at L. F. Rothschild?

A Is this supposed to be chronological order, Mr. Goldstein, because that isn't the way it happened.

Q No. At some time you went to see Mr. Loeb, didn't you?

A Yes, but there is much more to it than that.

Q And you spent very little time with Mr. Loeb, isn't that so?

A That's right.

Q When did you go to Mr. Loeb's office, in the morning, in the afternoon?

A It would have been approximately between 10 and 11 o'clock in the morning.

Q What day of the week, do you remember?

A If my memory serves me correctly, it was Monday, but it could have been Tuesday.

Q Approximately 10 or 11 you got there, and I believe you testified you spent very little time with him, a few minutes?

A That's right.

Q During that period of time, did you fill out the account card?

A Whatever I was --

MR. BLUM: Objection. It hsan't been established the account card was filled out by someone else.

THE COURT: This is about the third time we have gone over this ground so by now we all ought to have a fairly clear recollection. My recollection is she did sign an account card when she was there.

MR. BLUM: Yes.

A Yes, sir.

Q And you also received a receipt for the bonds?

A Yes, sir.

Q During this time, you were with Mr. Loeb?

A No, sir.

Q It was subsequent?

A No, sir.

Q Before you saw Mr. Loeb?

A I saw Mr. Loeb, then filled out the account card. I am sorry, I misunderstood.

Q And when did you get the receipt, after you had seen Mr. Loeb?

A Yes, sir.

Q And after that, did you leave L. F. Rothschild?

A Yes, sir.

Q Approximately how much time in total did you spend at L. F. Rothschild?

A It's been two years. To the best of my recollection, I would say approximately -- it would have been under an hour.

Q Would it have been considerably under an hour?

A I said to the best of my recollection it is under an hour. It would have been probably a half an hour at least.

Q Have you ever been back to L. F. Rothschild since that day?

A No, sir.

Q Have you ever spoken to Mr. Loeb since that day?

A Not until yesterday.

Q Do you know what securities were purchased for you out of the proceeds resulting from the sale of your debentures by L. F. Rothschild?

A Specifically?

Q Yes.

A I believe I have already testified that I know there were some Fanny Mae bonds, I know that there was a very -- discussion that only quality would be bought.

Q I didn't ask you that. What specifically was purchased?

A I remember AT&T.

Q Stock?

MR. BLUM: May we have this identified in time?

MR. GOLDSTEIN: I said out of the proceeds.

MR. BLUM: May we have it identified as to the time of the witness' knowledge? Is he asking whether she knows now what she bought then?

MR. GOLDSTEIN: Yes.

THE COURT: Why does it matter?

MR. BLUM: Obviously we have had some discussions about various aspects of the case in the last few days.

THE COURT: We are talking about purchases that were made out of the proceeds of the sale of the debentures in issue. If she knows what they are, she knows. Whether she knew back then, it doesn't seem to me to be tremendously material.

Q Well, AT&T, was that stock, Mrs. Grupe?

A As far as I know.

Q Any other purchases?

A I believe I would like to make a statement here that I left the purchases up to my investment counselor, and acted on his advice.

Q Fine. But the question was do you know what was purchased out of those proceeds?

A He discussed some of them with me, yes. Do I remember them specifically now, no.

Q OK. Now, your investment counselor was Mr. Morris, correct?

A That's right.

Q Was he being paid for his counseling?

A He is.

Q Do you have an agreement with him?

A Yes, sir.

Q Do you have a copy of that with you?

A No, sir.

Q Do you know what the agreement says?

A That he has limited power of attorney to purchase, to buy and sell investments for me. There is more to the paper than that, but I know that's what I signed.

Q It is not limited to certain kinds of investments?

A That, sir, I would have to check. I don't think so.

Q What was he being paid for advising you?

A Are you asking for how much I pay him a year?

Q How much you pay him. I don't know what your arrangement is. What is your arrangment with regard to payment to him?

A $250 a quarter.

Q That's $1,000 a year?

A Yes, sir.

Q You heard Mr. Rowney testify the other day that his firm charged, I believe $900 a year?

A Yes, I heard it.

Q Do you know if all trades are made by Mr. Morris through L. F. Rothschild on your behalf?

A As far as I know, they are.

Q Were you ever advised that Mr. Loeb would be handling your account at L. F. Rothschild?

A Not that I know of. I don't recall.

Q Do you remember your purpose in seeing Mr. Loeb?

A Yes, sir.

Q What was that?

A When Mr. Lamula wouldn't sell my bonds, I had to take them someplace else.

Q And you were advised to see Mr. Loeb?

A Yes.

Q And he was going to sell them for you?

A Yes, sir. Or his firm. I don't know specifically.

Q Were you advised to see Mr. Loeb himself, though?

A Yes, I was.

Q What was the purpose in seeing Mr. Loeb himself, if you know?

A He handles many investments for my nephew, who is an investment counselor, as you know.

Q After the sale of your debentures in August, did you remain friendly with Dorothy Emerson?

A Yes, sir.

Q Do you still consider her a friend today?

A Yes, sir.

Q In fact, isn't it so that in November of 1974, long after you had sold these investments, you went to a testimonial for her?

A That's right.

Q At that testimonial, you saw Mr. Lamula, didn't you?

A Briefly.

Q Did you say anything to him?

A I was talking to someone else. Mr. Lamula came up to me, asked me how I was coming with my job on the Hurd Commission, and I told him I didn't get the job on the Hurd Commission, and that was the end of the conversation.

THE COURT: Mr. Goldstein, I always like to assume that attorneys know what they are doing and are going someplace specific, but it seems to me we have spent twenty minutes in going over testimony elicited the last time the lady was on the stand.

MR. GOLDSTEIN: I think with some variations. I may be wrong.

THE COURT: Nothing with any great note. Are you going over the whole thing to see whether she varies slightly?

MR. GOLDSTEIN: No, your Honor.

Q Mrs. Grupe, is this your handwriting?

A Yes.

MR. BLUM: Are you referring to an exhibit which has been previously identified?

MR. GOLDSTEIN: No.

THE COURT: Then I think it should be marked for identification.

THE WITNESS: I am sorry, but I cannot identify that.

MR. BLUM: Excuse me, before the witness answers, your Honor, I would like to see that.

MR. GOLDSTEIN: She just said it was her handwriting.

MR. BLUM: Before the witness answers anything further, I would like to see it.

THE COURT: He is entitled to have her identify it. Before anything is asked, have it identified.

Q Does that picture go with that letter?

A Probably. This is a picture that was taken in Rome.

Q And did that go with this letter? Does your reading that refresh your recollection?

A It could have.

MR. GOLDSTEIN: I would like to have them marked as one exhibit.

THE WITNESS: I'm not identifying the whole thing. I want to make that very plain.

(Defendants' Exhibits I-1 and I-2 marked for identification.)

THE WITNESS: There is writing on the back I am not identifying.

THE COURT: The witness says the writing on the back of the letter is not hers.

MR. GOLDSTEIN: I was going to say that the writing on the back is not hers, and depending upon -- well, I am not offering the back into evidence at this time, and if it doesn't go in, I will --

THE COURT: You so far haven't offered either of them.

MR. GOLDSTEIN: At this time I will show it to

Mr. Blum and I formally offer them into evidence.

THE COURT: She testified, Mr. Blum, that she believed the picture went with the letter. Is that correct?

THE WITNESS: I believe so, sir. I wouldn't want to swear to it.

MR. BLUM: I have no objection to this being offered in evidence.

THE COURT: It may be received.

(Defendants' Exhibits I-1 and I-2 for identification received in evidence.)

THE COURT: Not including the writing on the back.

MR. GOLDSTEIN: I want to ask the witness about that. Depending on her answer that will determine what happens with the back.

Q Mrs. Grupe, that picture you testified was a picture of you taken in Rome?

A Yes, sir.

Q So, therefore, that picture had to be mailed sometime after July 2, is that correct?

A Not necessarily.

Q Could it have been mailed from Rome?

A It could have been.

Q Do you know when it was mailed?

A No, sir.

MR. GOLDSTEIN: I would agree, in view of her testimony, to excise the writing on the back since it was not made by Mrs. Grupe.

MR. BLUM: In light of the testimony that's given, then, I am going to object to the picture. I don't understand the relation of it. I thought it was going to be tied in time to the other.

THE COURT: You already said you had no objection to putting it in. I don't see its relevance either.

MR. BLUM: I apologize. I don't want to take up time with it.

THE COURT: There is also writing on the back of the picture that hasn't been identified as the witness' writing.

MR. BLUM: I will concede it is the witness' writing.

THE COURT: Do you also concede since you are the witness that that is your handwriting on the back?

THE WITNESS: Yes, sir. That's my handwriting.

THE COURT: We finally come out of this with the picture plus the writing on the back of it, for whatever relevance it may have, as being admitted in evidence; and the letter, undated, but not the back of the letter.

MR. BLUM: May I approach the bench?

(At the side bar)

MR. BLUM: I would like to qualify my acceptance of this for one reason. Apparently, the claim is going to be made from the writing that's on the back that apparently something is in John Lamula's possession. Is that correct?

Your Honor, I served a notice to produce, which was a broad gauge notice to produce, and I was under the impression I was provided every piece of paper, and Mr. Goldstein will concede this is the first time I have seen this.

MR. GOLDSTEIN: This is the first time I saw it a few days ago.

THE COURT: Are we addressing ourselves to the picture or the letter?

MR. BLUM: I never saw either of them before.

THE COURT: I don't see what on earth the picture has to do with anything, but I will go further. I do not think that the picture went with the letter, despite the witness' assumption.

However, the letter seems to refer to something else, a security or some form of document.

MR. BLUM: Again, forgive my slowness of reaction time on this, but I had thought this was something that had just been written or whatever, but my goal, I asked Mr. Lamula on his deposition whether or not he had any communication between himself and Mrs. Grupe, I served him with a notice to produce all documents, and this is the first time I have seen this. I don't know.

THE COURT: Where does it leave you?

MR. BLUM: I don't know. I think it's dirty pool. I move for its being stricken from evidence on the ground it constitutes a surprise, that it is not referred to in the pretrial order. I don't know where we are going with it.

THE COURT: I can't rule on something you don't know what you are doing.

MR. BLUM: Then I will make a motion that the Court permit me to withdraw my concession that it be admitted in evidence and that their admission to them be denied because they were not produced timely nor referred to in the pretrial order nor any deposition conducted in this case.

THE COURT: What say you, Mr. Goldstein?

MR. GOLDSTEIN: The only thing that I could say is that this was found recently by Mr. Lamula. I did not know about it. I can only assume he didn't know about it. He found it in exhaustive searches through his records.

This is a small piece of paper. It could easily be lost in a myriad of other papers. At this time I don't see there is any prejudice.

THE COURT: Could you care to make an offer of proof as to what you think the exhibits establish? That's what's got me totally baffled.

MR. GOLDSTEIN: I think the language in the exhibit establishes her motive perhaps for this lawsuit.

MR. BLUM: What are you talking about?

THE COURT: This letter does? What part of the letter are you referring to?

MR. GOLDSTEIN: "You will have to find me a husband."

THE COURT: That refers to the sentence before, which says, "Take good care of this. If anything happens to it, you will have to find me a husband."

The problem with this exhibit is I am dead certain that she is not referring to the picture when she says, "Take good care of this." Consequently, the exhibit is meaningless as it now stands.

MR. BLUM: What motive did he refer to? Do you think he was hired as a husband hunter?

MR. GOLDSTEIN: You said it. I didn't.

THE COURT: But because the exhibit is incomplete and is therefore confusing, and somewhat meaningless, plus the fact that it wasn't timely produced, I am going to grant the plaintiff's motion and strike the exhibits from evidence. I will advise the jury that the exhibits are stricken.

(In open court)

THE COURT: I am advising the jury that the two exhibits which were previously received in evidence, for reasons that need not concern you, are being stricken from evidence and will not be considered by you.

(Defendants' Exhibits I-1 and I-2 stricken from evidence.)

Q Mrs. Grupe, did you ever tell Mr. Loeb that you wanted $12,000 a year as income on your investments?

A Not that I recall.

Q Did you ever tell that to Mr. Morris?

A We had a lot of discussion. I do not remember that exact amount as being mentioned.

Q Do you remember any amount being mentioned?

A No, sir.

Q Could it be you never told him you wanted income?

A That wouldn't be possible. I wanted income.

Q You told Mr. Lamula you wanted $12,000 a year income. Is it your testimony you don't remember what you told your nephew?

A I remember that the figure $12,000 was arrived at by Mr. -- in a discussion with Mr. Lamula. I do not believe I testified that I mentioned the $12,000. I could be wrong, but I do not recollect that that's the way it happened.

Q When you saw Mr. Loeb, did Mr. Loeb say he would sell the securities for you right away?

A I don't believe "right away" was mentioned.

Q Did he tell you how he would sell the securities?

A Not that I remember, nor did I ask. He was doing business with my nephew. I was pretty much out of it.

MR. GOLDSTEIN: Your Honor, at this time I would like to stop my examination of Mrs. Grupe because the rest of it I would like to go into after I have finished with Mr. Loeb.

THE COURT: To the extent he has covered things now, Mr. Blum, do you have any cross-examination on these portions? To my opinion, it was almost entirely a rehash.

MR. BLUM: Two questions. For the first time I think there was some question as to what Mr. Morris was saying to her and what she was saying to Mr. Morris, and at an earlier time your Honor pointed out that door was not opened.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. BLUM:

Q What did Mr. Morris tell you that Friday morning was the value of your securities?

MR. GOLDSTEIN: I don't believe I went into what Mr. Morris told her. I kept asking her what she knew to be the fact. I asked her if she knew whether he used this, whether she knew he did that. I did not ask her what Mr. Morris told her he did.

THE COURT: You did ask her whether Mr. Morris advised her on that occasion, I believe August 2, of the value of her securities, and she said yes. I think that opens the door to what he told her.

Q What did he tell you was the value of the securities on August 2?

A $63,000.

THE COURT: As a matter of fact, I believe that also came out on her direct examination, because I remember the figure.

Q While there has been discussion here as to what your sister told you Will Morris said about the quality of the debentures, was there anything said in the discussions which you had on that Friday, or when you came to New York to see Mr. Morris, did he tell you directly what he thought of the quality of the securities?

A Yes, sir.

MR. GOLDSTEIN: I object to the characterization in that statement.

THE COURT: Sustained.

MR. BLUM: I have no further questions at this time.

THE COURT: I have one question.

You testified that your sister told you that the family was concerned about your investment security and that led to the two of you going to the library.

THE WITNESS: Yes, sir.

THE COURT: Did she indicate to you at that time that she had already discussed your securities with her son, Mr. Morris?

THE WITNESS: William Morris?

THE COURT: Yes.

THE WITNESS: No, sir. Not that I recall.

THE COURT: Had she discussed it with her son?

THE WITNESS: She could have, sir, and she did with her husband. She did say that.

THE COURT: All right.

You are temporarily excused. We are going to recall you, I think, after Mr. Loeb is done. He is due here at 11.

MR. BLUM: He may be in the hall.

THE COURT: We will give the jury a brief recess while we are looking for the missing witness.

(Recess)

(In open court; jury present)

ROBERT L. LOEB, called as a witness by the defendants, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION (Continuing)

BY MR. GOLDSTEIN:

Q Mr. Loeb, I believe we were talking about the account card.

MR. GOLDSTEIN: At this time I would like to offer this in evidence.

MR. BLUM: May I have a voir dire?

THE COURT: Will you mark that for identification.

(Defendants' Exhibit J marked for identification.)

VOIR DIRE EXAMINATION

BY MR. BLUM:

Q Mr. Loeb, this is your personal book record of each transaction that took place in Mrs. Grupe's account, isn't it?

A Yes.

Q What period of time does it cover?

A It covers all transactions from the sale of the junk bonds we discussed yesterday to date, including recent sales.

Q Are there other records in your possession which disclose the transactions which took place on Mrs. Grupe's account on a basis more limited in time than this?

A There are.

MR. BLUM: Your Honor, at this point then I would like respectfully, while I have no objection to Mr. Goldstein using it perhaps for this purpose, I don't think that it should go in evidence because it reflects transactions which I thought we agreed were not relevant to the current discussions.

THE COURT: Let me see the card.

MR. BLUM: Other exhibits will cover the period of time.

MR. GOLDSTEIN: Your Honor, my basis for putting it in is to indicate whether or not Mrs. Grupe kept to her avowed purpose of avoiding stocks, kept to her purpose of getting income, and, most important of all, whether or not her account was properly -- well, I will withdraw that last part.

MR. BLUM: If all of those can be reflected on other accounts running to the end of the year, like monthly account statements, would those not be more within the scope of this case to work with? The same questions can be asked.

THE COURT: It would be better to use them. There are transactions here covering the initial sets of purchases and several additional during 1974. The remaining transactions are all '75, '76. You get pretty remote in time. It may well be that her investment intentions in 1976 are not what her investment intentions were in 1974.

MR. GOLDSTEIN: If I can employ that for a moment, maybe I can agree with Mr. Blum.

THE COURT: My suggestion to you is that you take the front side and only the first three transactions on the back.

THE WITNESS: If I may, I have statements of the firm which would reflect that time period, and I would be happy to offer those.

THE COURT: Do you have it with you?

THE WITNESS: Yes.

THE COURT: Give us the late '74 or early '75.

THE WITNESS: It would be the transactions in '74.

MR. BLUM: That seemed to me more appropriate.

MR. GOLDSTEIN: I would agree the first side and the first five lines on the reverse side, and the rest I would agree to be blocked out. Especially the fifth line I think is very relevant because of the testimony already received.

THE COURT: Come to the bench.

(At the side bar)

THE COURT: That line reads, "International Royalty & Oil Co., 500 shares bought on February 26, 1975." What is the pertinence of that?

MR. GOLDSTEIN: That isn't purchased, it's received.

THE COURT: That's right. What is the purpose?

MR. GOLDSTEIN: Why is she still holding it, why didn't she sell it?

THE COURT: I will allow you to use this and ask the witness about that.

MR. GOLDSTEIN: It would be much easier working with this card than going through those, because those I would have to examine before I ask the witness about that.

THE COURT: Look at them. They should cover everything on the front side and the first three on the back side.

(Pause)

MR. GOLDSTEIN: In addition, there are notations on here which I think are pertinent.

THE COURT: Like what?

MR. GOLDSTEIN: On the front side of the card. These numbers and these numbers.

MR. BLUM: The prices are reflected on the statement, every one of them.

MR. GOLDSTEIN: Not like that. Look at the first one.

MR. BLUM: That was when I called him before the deposition in 1975.

MR. GOLDSTEIN: There are a lot of numbers on the card that aren't on here.

THE COURT: I leave it up to you whether you put in the front page of this, blanking out the right-hand margin, or whether you use the substitute exhibit. Either way is all right with me. But the back part after the first three entries I will not admit in evidence, although I will let you, if you think it has any pertinency, question about the 500 shares of oil stock that he received, for whatever that is worth.

MR. BLUM: I am sure we can get Mr. Loeb to duplicate the thing, white out the parts.

THE COURT: Do it either way, but confine ourselves to '74 transactions.

(In open court)

MR. GOLDSTEIN: Your Honor, at this time I would offer into evidence the account card with the notation that we will black out the back of the card outside of the first three entries and the right-hand column at some time prior to the jury seeing it.

THE COURT: All right.

MR. BLUM: I will stipulate I have no objection to the introduction of this in evidence with the deletion of the matters that the Court directed should be deleted.

THE COURT: That's what I directed to delete and that's what he is deleting.

MR. BLUM: I have no objection to its admission in evidence under those circumstances.

THE COURT: I will explain to the jury the entries on the front on the right-hand side were made in connection with the litigation and have nothing to do with the business transactions we we are taking them out and we are deleting all of the back except the first three lines, because they are not contemporaneous with the facts involved in this case. They are transactions for the years 1975 and '76.

DIRECT EXAMINATION (Continuing)

BY MR. GOLDSTEIN:

Q Mr. Loeb, I believe Mr. Blum asked you if this was your personal account. This was the account of the firm, not you personally, is that correct?

A No, that is not correct.

Q It is your personal account?

A No, that is not correct either.

Q OK. Can you tell us what this is, then?

MR. BLUM: I think you have incorrectly stated my voir dire question, which is whether this card was from his personal records.

A In addition to my duties as resident partner, I am head of a sales team, which was then three and is now four people. Therefore, it is not a personal book, but a joint book. These entries are not made in any respect in my handwriting.

THE COURT: Mr. Loeb, you have to keep your voice up.

A I am sorry, I am trying to speak up. I hope you will bear with me. Let me know if you can't hear me and I will be happy to repeat it, please.

Q Now, this is in your personal account book?

A That is in the account books kept by my group for our mutual purposes.

Q Is Mrs. Grupe also considered to be a client of L. F. Rothschild?

A She is a client of L. F. Rothschild.

Q But under your immediate domain?

A That's not a correct question.

Q Any sales that may be made on her account or any trades of to go through your group for L. F. Rothschild?

A That is correct. That is correct as long as Mr. Morris chooses to deal with my group.

Q Oh, definitely. But if --

A That is true of Mr. Morris' other clients as well. He is in fact the client, for practical purposes.

Q But this says Mrs. Grupe is the client. Now, according to NASD rules and SEC rules, who is the client?

A Which rules do you have in mind? I really don't know that I understand your question. There is a specific procedure regarding investment advisers whereby if they submit -- may I answer your question this way? I am sorry.

Q Sure.

A If they submit to us, as Mr. Morris and Mid-Atlantic Consultants have submitted to us, statements to the effect that they are registered investment advisers and that they have on hand powers of discretion from their clients, then we, under Stock Exchange rules as well as under the rules of other regulatory bodies, do accept orders as directed by those investment advisers. In many cases those orders are placed in the name of account number 1792 at the Chemical Bank. It is not unusual at all.

Q In other words, there was no reason for you to see Mrs. Grupe on August 5 or 6?

A Yes, there was.

Q For what purpose?

A She asked to see me.

Q Well, wasn't it that she was referred to you by her nephew?

A No.

Q Are you familiar with Article 3, Section 2, of the NASD rules dealing with recommendations to customers?

A Yes.

Q Let me read that section and ask if you agree with this. "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer, as to his other security holdings and as to his financial situation and needs."

Based upon that section, weren't you under an obligation to inquire of Mrs. Grupe personally what her financial background was?

A No.

Q It is your contention then that it is satisfactory if her nephew did the work?

MR. BLUM: Objection. I don't think that is an appropriate question. There hasn't been any testimony this witness recommended any purchases to Mrs. Grupe.

THE COURT: Moreover, I don't understand what it has to do with this case.

MR. GOLDSTEIN: Your Honor, the contention here is that these were quote junk bonds and that she should have gotten out of them, they were not sutable for her. Mr. Loeb testified L. F. Rothschild sold the bonds.

THE COURT: Yes.

MR. GOLDSTEIN: Therefore, what I am trying to inquire is whether he had sufficient knowledge of his customer to make the decision whether or not those bonds were suitable for her and whether they should be sold.

THE COURT: He has testified that he didn't make the decision, her investment adviser made the decision.

Now, if you are attempting to establish that where there is an investment adviser in the picture, the brokerage firm which conducts the sale has an independent and double duty of reviewing the know-the-customer aspects, why don't you ask him that?

MR. GOLDSTEIN: That's what I am trying to.

Q Do you have any independent duty -- I will take his Honor's advise -- any independent duty to ascertain for yourself -- and when I say "for yourself," I mean does L. F. Rothschild, whoever handled the trade -- do you have a duty to communicate with Mrs. Grupe directly and ascertain her background and suitability for purchases and trades?

A Absolutely not.

Q Does L. F. Rothschild have in its records any statements as to Mrs. Grupe's financial standing at the time these debentures were sold?

A No.

Q Does L. F. Rothschild have a copy of the power of attorney that Mrs. Grupe allegedly gave to her nephew?

A No.

Q Have you ever seen such a copy?

A No.

Q Has anybody in L. F. Rothschild, to your knowledge, seen such a copy?

A No.

Q The various sales and purchases listed on the account card, did you have anything to do with any of them directly?

A Yes.

Q Do you know which ones?

MR. BLUM: Can we get the question "anything to do with" a little better established?

Q Anything to do directly. OK, let me expound on that.

Did you handle any of the trades listed on the account card?

A I definitely handled the trades involving the sales of the junk bonds.

Q Did you make the calls to the marketmakers to sell them?

A No.

Q What was the extent of your participation?

A Mr. Morris called me and told me to sell the bonds after Mrs. --

Q Don't tell me what Mr. Morris told you. Tell me what your participation in the sale was, what you did.

A I had previously discussed this matter with a partner of mine who is responsible for our trading in junk bonds. He is the second largest junk bond trader in Wall Street. And I told him that I had been advised that there was pending litigation, I would like to get some knowledge from him as to the markets --

Q Excuse me, did you tell him there was pending litigation?

A Excuse me, potential litigation. Thank you. Possible litigation. Actually, those were my words, "possible litigation." I would like to get some knowledge as to whether he had any views on the quality of these bonds as well as on the marketability of these bonds. That was the initial contact I had with him on this matter.

Q Didn't you already know the quality of these bonds?

A At the time I was first asked to look at these bonds, I did the sort of research that is normally done. I checked Moody's and Standard & Poor's manuals as to their ratings, I looked at the record of earnings and dividends of the underlying securities, I looked at the price action of the securites, etc., and established my own opinion of the quality, but in addition, in talking to a very good, in fact super, trader, I might as well have gotten his point of view in trying to form my judgment, and I did confirm that they were indeed junk bonds, and he did confirm to me that there were very few marketmakers in each bond and that the spreads were very wide.

Remember, this was in 1974 when our industry was in utter chaos, when many marketmakers were going broke, when there were many marketmakers so marginal that we did not wish to do business with them for fear if we sold them something, they couldn't pay for it, and if they bought something -- and if they sold us something, they couldn't deliver it.

MR. BLUM: Your Honor, this may be an occupational hazard in this business, but may I ask this witness as well as Mr. Lamula be asked to answer the question?

THE COURT: Yes. Confine yourself to the question.

THE WITNESS: I thought I was, excuse me.

THE COURT: You went beyond it.

A Do you want my direct answer? I am sorry.

THE COURT: After you were instructed to sell the bonds, what did you do, if anything?

A I called my partner, Mr. John Angelo, and I said, "I have orders to sell the following bonds" -- debentures actually, I believe -- and I have him exact descriptions of the bonds and the quantities.

I said, "Take your time and sell them carefully because there may very well be litigation."

He called me back and said, "The market in these bonds is so bad, and the situation is so bad, that I, rather than trade these on what we call a net basis, where we would briefly own them for perhaps an hour, perhaps a day, I want to act only as an agent and sell these on a commission basis," which is a very unusual procedure in our business and for my firm and I took his advise and we did sell these on a commission rather than a net basis with the exception, I beleive, of five bonds which had been sold prior to our understanding of the situation on a net basis.

He sold them during the course of the day, with the exception of some bonds which our record will show were not in bearer form at the time we received them. It was only when we got them in proper form -- I believe those were Elco's or one of the issues was sold a few days later.

Q Now, were these bonds executed in your presence on the back?

A No.

Q They had already been executed?

A I am uptown. Our main office and trading operation is on Wall Street.

MR. BLUM: Are you referring to the stock powers?

Q The stock power on the back on the bond, had Mrs. Grupe signed those in your office?

A I have no idea.

Q Were they signed when she presented them to you, so you remember?

A You may recall that I told you that I turned her over to my associate to work with forms, receipt of securities, filling out the new account form and the like.

Q I see.

A So I don't remember. I don't know.

Q Did you bring with you today the order tickets for the sale of these debentures?

A No. We don't have any.

Q You don't have any?

A No.

Q When you execute a sale, say of Tech Op, doesn't your firm make up an order ticket?

A I don't know what's done in the main office.

I execute a great many orders over the phone with our traders. I do not make up an order ticket.

Q Do you know --

A We have confirmations. We do not have order tickets.

Q But there may be an order ticket that you are unaware of?

A Not in my office.

Q Not in your office. Where the trade is made?

A I would be very surprised if there were.

Q Well, are you familiar with the way these debentures are traded?

A I am not a trader.

Q Are you familiar with the procedure?

A By and large, I am not.

Q OK. That's your answer on that. Now, the purchases that were made, were those made -- withdrawn.

Were purchases made all on the recommendation of Mr. Morris?

MR. BLUM: Which purchases are we referring to?

MR. GOLDSTEIN: Any purchases after the debentures were sold.

A No.

Q Did L. F. Rothschild suggest making certain purchases?

A No.

Q Did Mrs. Grupe suggest making certain purchases?

A U. S. Treasuries.

Q Well, for instance, the American Telephone, Associated Dry Goods, who suggested buying those issues?

A I don't know who suggested them.

Q It could have been Mr. Morris or it could have been --

A The orders were placed by Mr. Morris.

Q I see. So at no time did L. F. Rothschild initiate any of these purchases?

A May I?

Q Well, by "initiate" I mean did L. F. Rothschild ever call up Mr. Morris and suggest that he purchase for Mrs. Grupe certain securities?

A No.

Q So it was always Mr. Morris who called up and said, "Purchase XYZ corporation," or whatever?

A May I clarify the relationship?

Q Surely.

A Habitually, I would say on the average of once a week, insofar as we have four research meetings in the morning and one in the afternoon a week, plus gobs of written material, institutional material, I call Mr. Morris and I review our recommendations on the average of once a week.

Obviously, he talks to me as he does other investment bankers and brokers and he comes to investment conclusions.

Q I see. Now, I see on August 19, 1974, Mrs. Grupe purchased 200 shares of Seaboard Coast Lines. Whose suggestion was that?

A I have no idea whose suggestion. I thought I made that clear to you.

Q And Seaboard Cost Lines is a railroad company, is it not?

A It is a major railroad in the south and in the midwest.

Q Would you consider it a good investment at that time?

THE COURT: If you are able to remember at this time what you might have known at that time.

A It happens to be a security that I have never followed. It is a fine major railroad, not likely to go broke.

Q Thank you.

THE COURT: And as railroads go, that is most unusual.

THE WITNESS: It is not an eastern railroad.

Q Were you familiar with Southern Company at that time, another purchase Mrs. Grupe made on September 18?

A As familiar as I am with a lot of stocks that I don't particularly follow.

Q OK. I notice from this that she purchased Southern on September 18, 500 shares, September 18, 1974, at 9 1/2 net, and she sold the 500 shares on October 22, 1974, for 10 3/4. That means she made about 1 1/4 points, does it not?

MR. BLUM: Where are you referring on this?

MR. GOLDSTEIN: At the bottom.

Q So she made 1 1/4 points on this?

A If your figures are correct, then they are correct.

Q Well, the 10 3/4 in the sold when it says price, to that was added a commission, was it not?

A It was subtracted from the price, yes.

Q So she didn't get 10 3/4 for it, she got something less?

A Right.

Q So out of a purchase of approximately less than -- between 4,500 and $5,000, she made maybe a hundred dollars?

A I beg your pardon?

Q $500, I am sorry. She made about $500?

MR. BLUM: Again, your Honor, I object. I don't see what this has to do with any investment decisions that were made by Mrs. Grupe or investment policy that was determined, if any was, by Mrs. Grupe, or how it relates to the questions of suitability and markup which have been put in issue or indeed how it relates to the affirmative defense he has raised with regard to the manner in which L. F. Rothschild sold the debentures, and, therefore, may I respectfully request this line of testimony be stricken?

THE COURT: You are objecting as to relevance?

MR. BLUM: Yes, sir.

THE COURT: What is the relevancy to this line of questioning?

MR. GOLDSTEIN: We claim these bonds were dumped, and I think as part of indicating that, we have to show motive, definitely on behalf of Mrs. Grupe, and perhaps on behalf of Mr. Morris and L. F. Rothschild for dumping these bonds, and one of the ways to show it is to show they kept buying stocks where she made $500, and then selling within a month, getting commissions all the time.

THE COURT: You are not going to establish it from this witness because this witness was merely fulfilling orders given to him thereafter by Mr. Morris. He didn't make these decisions. He gave Mr. Morris some general investing advice, but he didn't make the decisions as to when to trade on this account, so you are wasting your time with this witness.

MR. GOLDSTEIN: Except I believe it would be up to the witness to decide whether L. F. Rothschild had some duty to Mrs. Grupe, who is listed as the client on this account sheet.

THE COURT: No, sir. L. F. Rothschild is not a party to this litigation, and whether or not they are adequately or properly following the NASD regulation is not an issue in this litigation. So let us move on to some more relevant topics. I do not mean to suggest to the jury that I have any question in my mind about it. I am just saying it is not an issue in this litigation.

Q Mr. Loeb, are you familiar with the ratings of the various securities Mrs. Grupe purchased through L. F. Rothschild?

A No.

Q Would your associate, Mr. Angelo, be familiar with the ratings, if you know?

A Excuse me. Let me amend my first statement. I am familiar with the ratings of the Treasuries and the Federal National Mortgage Association bonds, which are federal agency bonds? They are AAA, the best --

THE COURT: Is that what is referred to as Fanny Mae?

THE WITNESS: Right. They are the best quality bonds that can be bought.

Q Do you know if Seaboard Coast Line is A rated?

A No.

THE COURT: No, you don't know, or no, they are not?

THE WITNESS: No, I don't know, and I don't know what it was rated then.

Q Isn't it a fact they were rated below A in Standard & Poor's and Moody's?

THE COURT: He already told you he doesn't know the ratings. That is an improper question when the witness testified he doesn't know. You are in effect testifying when you do that, Mr. Goldstein.

MR. GOLDSTEIN: Mr. Blum, do you have the Moody's manual there, please?

MR. BLUM: I have no stock manuals of any kind.

MR. GOLDSTEIN: I have no further questions of this witness.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. BLUM:

Q Mr. Loeb, you expressed some opinions on the quality of the securities which you called "junk bonds," and perhaps it is appropriate if the jury were to know something of your qualifications and L. F. Rothschild's qualifications to express that view. Can you tell us where you were educated?

A I am a graduate of the Wharton School at the University of Pennsylvania.

Q When did you first start to work in the securities industry?

A Twenty-two years ago.

Q Where did you start to work?

A I was trained at Dryfus & Co. about a year and a quarter.

Q Then what happened?

A I have since been at L. F. Rothschild & Co., of which I became a partner six years ago.

Q In the course of your work at L. F. Rothschild, do you supervise any employees?

A Yes.

Q Are any of them registered to deal in securities or to act as registered representatives with the major stock exchanges or with the NASD?

A Yes.

Q How many?

A Approximately forty-five under my immediate supervision.

Q Does L. F. Rothschild & Co., if you know, maintain research facilities?

A Yes.

Q Does L. F. Rothschild & Co. maintain a substantial bond trading department?

A Yes.

MR. GOLDSTEIN: Your Honor, I would object to the word "substantial."

MR. BLUM: Maybe we can --

THE COURT: Let's not pursue it. Why do we get off into these issues?

MR. BLUM: Counsel was questioning the manner in which these debentures were disposed of.

THE COURT: I understand, Mr. Blum. Please proceed.

Q Do you have with you the authority of Mid-

Atlantic Consultants, to which you referred, to act as, to regard them and their clients as -- withdrawn.

Do you have with you a letter of authority from Mid-Atlantic Consultants of the nature which you described in your direct testimony?

A I believe I do. I did yesterday.

MR. GOLDSTEIN: Your Honor, I would object to this. I believe the train here is from Mrs. Grupe to L. F. Rothschild. Mid-Atlantic can give him anything they want, but that doesn't show he had authority to act through Mid-Atlantic for Mrs. Grupe.

THE COURT: I didn't know it was an issue in the case and I don't know why we are bothering with it. The testimony has been unequivocal after August 2 or 3 or thereabouts Mr. Morris, who was with Mid-Atlantic, has been Mrs. Grupe's investment adviser, and has been placing trades for her account through the Rothschild brokerage.

Now, what does all the rest of this have to do with the case?

MR. BLUM: I will withdraw the question, your Honor.

Q You say apart from Treasury bills, Mrs. Grupe didn't give you any investment instructions. Was there any time during the three or four months -- was there any time at the opening of the account where she either added in or took out cash, if you recall or know?

A I examined the statements and I have my files, and I believe she took out at some point $25,000 and put back in $20,000, something of that sort, during this period.

Q I show you --

THE COURT: While you are thumbing through those papers, Mr. Blum, may I see Exhibit J?

If you are going to be any longer, I will put a question to the witness, unless you are ready.

MR. BLUM: Why don't you go ahead, your Honor. There are just two of these I think that relate to it.

THE COURT: Mr. Loeb, do you recognize the handwriting on the left-hand margin of Exhibit J?

THE WITNESS: It is almost certainly that of Miss Katz, to whom I referred earlier.

THE COURT: Your assistant?

THE WITNESS: Yes, who is a registered representative.

THE COURT: What do you make that date out to be?

THE WITNESS: It could be either a 5 or a 6 as the month. I would have to guess a 5 because of the angle. And the last 22 days 1974.

THE COURT: You make that to be a 5, not a 6?

THE WITNESS: I do.

THE COURT: Do there also appear to be quotes on those securities as of that date?

THE WITNESS: That would be my impression, but perhaps you wish to call Miss Katz. I just don't know.

THE COURT: What puzzles me is the date of the quotes precedes the date of the account. Do these appear to be back-quotes obtained later on? Do you know anything as to how those quotes got on the card and what purpose they are on there for?

THE WITNESS: The only thing I can say is that we were consulted by Mr. Morris about these securities at a prior date, and Miss Katz is a hoarder of information and detail, and she may have very well -- it may very well be we got quotes for him and when the securities came in she made these notations on the sheet.

MR. BLUM: Perhaps if I can voir dire this one question or two further, I can refresh that.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. BLUM:

Q Mr. Loeb, you referred this case, this client to me, did you not?

A Yes.

Q At the time you referred her to me, did I ask you to obtain quotations with regard to those securities for the dates of on or about May 22, do you recall?

A Perhaps. I really don't remember. Oh, yes, I do remember, and I know why. Because we were looking at the -- I don't know why, but I do remember you asking me. I have gotten Mr. Blum more darn quotes on these bonds.

THE COURT: Do you know the source of the information? Was it the yellow pages or something else?

THE WITNESS: It would be the yellow pages. We keep files on those.

THE COURT: I mean yellow sheets, not yellow pages.

THE WITNESS: I understood. We keep files of those in the trading room.

MR. BLUM: I am not going to offer any of these exhibits, your Honor. I have one other question which may clarify the jury on some matter.

Q Mr. Loeb, I am your personal lawyer, am I not?

A Right.

Q Am I the attorney for L. F. Rothschild & Co., if you know?

A You absolutely are not.

Q Have I at any time, or has my firm, represented L. F. Rothschild at any time, to the best of your knowledge?

A Not that I know of. We do have counsel.

MR. BLUM: I have no further questions of the witness.

REDIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Mr. Loeb, going back to Southern Company for a minute, it says that Mrs. Grupe bought 500 shares at 9 1/2 net. What does "9 1/2 net" mean?

A In this instance?

Q Yes.

A You may recall that utility stocks were very much out of favor after Con Ed passed the dividend, and the only way many of them could raise money was to come to the market with common stock. This was undoubtedly, since we don't position listed stocks and sell them net to clients, this undoubtedly was a so-called secondary offering or underwriting of new shares by the company with appropriate prospectuses, registrations, and the like.

Q I see. Wasn't Mrs. Grupe supposed to get a copy of the offering circular since it was an underwriting?

A Yes.

Q Did she?

A Our records will show that, sir. We send -- if I may, we send automatically, wherever we take down such stocks our records will show that each and every client receives a mailint of the prospectus. I can't guarantee that she received it.

Q Could this also mean that the stocks in question were sold out of inventory?

A No. Not in the sense in which you ask the question. It is exactly in the sense in which I told you. That way and no other way.

MR. GOLDSTEIN: No further questions.

MR. BLUM: I have none.

THE COURT: You are excused, Mr. Loeb.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: Are you going to place Mrs. Grupe back on the stand now?

MR. GOLDSTEIN: Yes, your Honor.

BERNICE C. GRUPE, resumed.

THE CLERK: Please remember you are still under oath.

DIRECT EXAMINATION (Continuing)

BY MR. GOLDSTEIN:

Q Isn't it a fact you received the account card from Mrs. Vena after you had started doing business with John Lamula at the DeWitt Clinton in Albany?

A As I recall, yes.

Q That's where it was mailed?

A Yes, sir.

Q When you went down to the bank with Mr. Lamula the first time to take out the loan on the certificate of deposit, had you known about going down to the bank prior to Mr. Lamula showing up on that date?

A I imagine so. I don't recall exactly. I do remember distinctly that we were going to get rid of the certificate of deposit because it was not safe, according to Mr. Lamula.

Q You weren't getting rid of it, you were taking a loan against it, isn't that so?

A I was getting rid of it.

Q Isn't it a fact you took a loan out against it?

A Yes, but I was getting the cash so that in my opinion it was getting rid of it.

Q I see. Now, isn't it also a fact that the day before Mr. Lamula came to take you to the bank, you had arranged with the bank vice president -- you arranged a meeting with the bank vice president to come down?

A Yes, sir.

Q Therefore, you knew at least one day before that Mr. Lamula was going to take you down to the bank?

A Yes, sir.

Q Did Mr. Lamula tell you about the investments you were going to make in May prior to your making them?

A The individual investments?

Q Yes.

A He might have mentioned names, but I couldn't recall.

THE COURT: It seems to me you have gone all over this at least twice and maybe this is the third time. When are we going to get to something new?

MR. GOLDSTEIN: In a moment, your Honor.

Q Mrs. Grupe, William Morris' brother, what is his name?

A Robert.

Q He is in the securities business also, isn't he?

A Has just changed positions. I believe his title is financial adviser and he is in a bank.

Q Where is his office?

A I don't know. I know he is in Rhode Island, but I don't know where he is affiliated. He just moved within the last month.

Q Where was he in 1974?

A Niagara Shares.

Q Is that a brokerage house?

A I have to say I don't know that either. He was a financial analyst on oil. If that's a brokerage house, then that's where he was. I don't know.

Q Where was his office located?

A Buffalo.

Q In Buffalo?

A Yes.

Q Do you remember if at that time he was in a similar business to William -- that is, in investment on securities?

A I have already said I didn't know exactly what he did. His title was to keep track of the oil investments of Shelkof and people like that, wealthy people, but he wasn't an investment adviser, no.

Q Following your trip to Mr. Lamula's office, did you proceed to Mr. Loeb's office?

A I believe so.

Q The same day?

A As I recollect, yes.

Q Were you advised by John Lamula on several occasions that the interest you received on some of these bonds had to be declared as income?

A I do not remember that.

Q Were you advised by him on several occasions that the prepaid interest that you had to pay when you had to purchase the bonds and would get back you could deduct from your income tax statement?

A I do not remember that. I had never made out an income tax statement in my life before then.

Q Well, did you make out your income tax statement for the year 1974?

A No, sir.

Q Who did?

A An auditor in the State Tax Department.

Q Based upon the information you gave them?

A Yes, sir.

Q Did he also make out your U.S. income tax return?

A Yes, sir.

Q The state tax man did?

A Yes.

Q Is this your income tax statement for the year

1974?

A It looks like it. It has my name on it, yes.

MR. GOLDSTEIN: Will you mark this?

*** (Defendants' Exhibit K marked for identification.)

MR. BLUM: I have no objection, your Honor.

THE COURT: It will be received.

** (Defendants' Exhibit K for identification received in evidence.)

Q Mrs. Grupe, did you receive interest checks from John Lamula before you received some of the debentures themselves?

A The exact date I don't recall. I know one interest check went to Miss Emerson, who forwarded it to me. I believe that might have been in June. And that would have been the first one that I remember, that I recollect.

Q Were there several other interest --

MR. BLUM: Again, may I object on the ground of relevance. I don't know where this is going.

THE COURT: I don't know either, but I keep hoping it is going to lead somewhere. You are not going to disappoint me, are you, Mr. Goldstein?

MR. GOLDSTEIN: I hope not, your Honor. It depends on Mrs. Grupe's answers.

Q Were there in fact several interest checks you got directly from Mr. Lamula?

A You can check my tax, but I remember distinctly three, and that's all I remember. I only had the debentures --

Q It is possible there were more?

A I doubt it very much. If not, you can prove it. If you can, I will accept it.

MR. BLUM: Maybe I can speed it along by conceding for the record the two months Mrs. Grupe owned the debentures she received whatever interest payments were supposed to be paid.

THE COURT: I had not assumed that was an issue. Therefore, I am still a bit puzzled as to where this is going.

MR. BLUM: If that will accelerate matters, I will concede it.

THE WITNESS: So will I.

THE COURT: Can we move on, Mr. Goldstein?

MR. GOLDSTEIN: Yes.

Q Mrs. Grupe, are these three interest checks that you received from Mr. Lamula?

A Apparently, yes.

Q That is your signature on the back of each?

A That is my signature on the back.

MR. GOLDSTEIN: I would like these marked for identification.

MR. BLUM: I have no objection to them being received in evidence.

MR. GOLDSTEIN: Then I will ask that they be marked in evidence as one exhibit.

** (Defendants' Exhibit L received in evidence.)

MR. GOLDSTEIN: The checks have a notation on the bottom. One check was received for Nortek, another Arwood, and the last Elco, for the record.

Q Mrs. Grupe, Elco, Arwood and Nortek, do any of those appear on your income tax return?

MR. BLUM: I object to the question, your Honor. I don't understand the relevance of the question.

THE COURT: I suppose it could go to credibility. Is that what you are doing here?

MR. GOLDSTEIN: Credibility and also to show that Mrs. Grupe has some financial abilities that she has been trying to conceal.

MR. BLUM: Then I will object to it. I don't understand.

THE COURT: As to the latter part, if you say failure to report income on an income tax return is indicative of knowledge of finances, I think you have to be way off base.

MR. GOLDSTEIN: Your Honor, that is what I am trying to develop, and I think perhaps I can succeed.

Q Those checks are not listed there as your having received --

MR. BLUM: Excuse me, I stand by my objection as to the latter point. If he is attempting to offer something to show my client didn't include a thousand dollars of income in her tax return, then I will withdraw my objection as to that, but as to the extent this is offered for the purpose of showing she is a financial expert, I will object to it.

THE COURT: I have sustained that aspect of it, but I wll allow it on credibility. The new federal rules on credibility are extremely broad.

Q Those checks do not appear as interest on your tax return, do they?

A Apparently not, no. I have already stipulated I did not make out that account, that tax return.

Q But this was made out with information you gave the tax man?

A Yes.

Q And whatever you didn't give him he didn't put down.

A Apparently. It certainly wasn't deliberate.

THE COURT: Have you looked at the treatment of the capital gain? Well, it wouldn't be a capital gain. She didn't hold them long enough. Have you looked at the treatment of the purchase and sale to see whether the interest checks are offset against the capital loss?

MR. GOLDSTEIN: They are listed separately, your Honor. There is a line -- there is a whole page that says interest income, and some checks are listed. These aren't.

THE COURT: I understand that, but when you make a quick turnover of a security within six months so that you can't treat it as capital gain for practical purposes interest received during that period can be netted out against it with the same tax result, which is to say if she lost a thousand dollars on the sale of a bond but received a hundred dollars in interest, she would have a net loss of $900, and since the loss is not to be treated as a capital loss, I suppose it would be netted out. Can you tell from the return how it is treated?

MR. GOLDSTEIN: Yes, there is a separate page listing capital gains and losses and on those are listed the debentures to show gains or losses. They are treated separately entirely.

THE COURT: Do they show dates of purchase and sale?

MR. GOLDSTEIN: No. It just shows in a page entitled "Bernice Grupe, capital gains and losses 1974," on the letterhead of Mid-Atlantic Consultants, Inc., which is attached to the tax return. It just lists the various securities including Southern Company, and states whether she took a loss or a gain. That is annexed as an exhibit to the tax return.

THE COURT: Can you tell whether the three interest checks were deducted from her losses?

MR. GOLDSTEIN: No, they are not.

THE COURT: You are sure they are not?

MR. GOLDSTEIN: It says "capital gains and losses," and the only figure that appears is the figure of 29,949, which is on that other sheet, and there is another figure of taxable income, and that is listed there as a loss, also.

Q Now, Mrs. Grupe, I show you on Schedule A and B, under "interest expense," can you tell me what that notation says? Can you read it, please?

A I am trying to. I didn't bring my glasses.

Q Let me read it then.

A I am sorry.

Q The heading is "interest and expenses," and it says, "John Lamula Investors, Inc., $3,543.29."

Now, if you know, Mrs. Grupe, doesn't that refer to the interest that you prepaid and John Lamula told you you could deduct?

A I do not know.

Q Let me show you Plaintiff's Exhibit 63. I believe that was marked in evidence also.

MR. BLUM: What is this?

MR. GOLDSTEIN: On the letterhead of John Lamula Investors addressed to Mrs. Grupe. It shows the trading date and refers to the debentures purchased in May.

MR. BLUM: No objection.

THE COURT: It is already in evidence.

MR. GOLDSTEIN: I believe it probably was.

Q This is in evidence as Plaintiff's Exhibit 63. You received this from Lamula Investors, did you not?

A Yes.

Q What is the notation on the right-hand side at the bottom, can you read that, the note?

A Yes. "Interest to be deducted by your account when filing 1974 return."

Q And could you read the amount in the right-hand column?

A $3,104.45.

Q Thank you. Can I have that?

A What are the numbers that appear at the top?

MR. GOLDSTEIN: I have no further questions, your Honor.

THE COURT: All right. Limit your cross-examination to the issues just covered.

MR. BLUM: I haven't any questions for her, your Honor.

THE COURT: Good.

You are excused, Mrs. Grupe.

(Witness excused)

THE COURT: Mr. Goldstein, call your next witness.

MR. GOLDSTEIN: Your Honor, the next witness would be Miss Emerson, and in view of the hour, I would request that we adjourn for lunch at this point, and Miss Emerson could be here at the end of the lunch period. Because of her infirmity, I did not think it wise to let her --

THE COURT: I have a 2 o'clocl matter on. If we adjourn now, you are going to raise havoc. Somebody has come in with an order to show cause. You have to proceed now. If she is available, put her on.

MR. GOLDSTEIN: She is not here. She is at the hotel subject to a telephone call. I assumed in view of the hour --

THE COURT: Mr. Goldstein, that's a very bad assumption to make. We have almost an hour to lunchtime.

MR. GOLDSTEIN: Your Honor, I didn't think we would finish this witness --

THE COURT: Mr. Lamula, don't go running out now because we can't wait twenty minutes for her to arrive. We have no other witnesses present, do we?

MR. BLUM: I have one rebuttal withess, your Honor, if the motions I might address are not granted. He is twenty minutes away.

MR. GOLDSTEIN: Miss Emerson is my final witness, your Honor.

THE COURT: We will excuse the jury at this time. You will be due back at 1:30.

Do not discuss the case.

(In open court; jury not present)

THE COURT: Gentlemen, I want to tell you on the record, as I have told you several times off the record, that this case involves about thirty-two to $35,000. It is now in its sixth day of trial. You have taken much too long with everything. This case could have been tried in two or three days, particularly considering the great areas of agreement by stipulation, and you are imposing on the Court by not having witnesses ready when we are prepared to go. You are imposing on the Court by being late in arriving. All of this is at great expense to the government.

Now, let us try to get something accomplished during this wasted time.

With respect to requests to charge, do we have the interrogatories here?

MR. BLUM: They have arrived, your Honor, and I have them here. They represent the changes that were made.

I have also a copy of a sheet for interpretation of them as they relate to various counts or causes of action. I have revised that to conform with the numbers. I did it rather late last night, and I hope they match.

THE COURT: I think the record should reflect the two of you have worked over these interrogatories to be submitted to the jury, which are eighteen in number, and you have agreed upon the. Some of them have sub-parts where if the jury answers affirmatively, they then have to go further.

I am obligated to tell you which of your requests to charge I will give and not give, and I am going to try to cover that rather rapidly right now. Are you prepared to take notes on it?

I will give defendants' supplemental charge to the jury as requested.

With respect to defendants' original charge, I am going to give much of it in substance, but there is a tendency within the charges to word everything both ways and that results in very confusing semantics. In other words, to word it in the positive and then in the negative and then to arrive at a conclusion.

MR. BLUM: Are you referring to the plaintiff's or the defendants'?

THE COURT: The defendants'. For that reason, I am going to leave out portions such as the first full sentence on the second page, the first portion of the second sentence in the first full paragraph.

I am also not going to include in the first sentence in the last paragraph on that page --

MR. BLUM: I don't understand what your Honor's change was in the middle paragraph, that full paragraph.

THE COURT: Starting with the word "if" and down to the semicolon.

MR. BLUM: In the second sentence of it?

THE COURT: Yes. There will be other similar omissions of the either/or proposition the way it is presently worded.

I am also not going to include the last sentence starting on the bottom of page 3 and the first two on the top of the next page since I think they are confusingly worded.

With respect to the last full paragraph on page 4, I am going to leave out the editorial comment in the second sentence beginning with "whom." I am going to leave out in the next sentence the phrase "without any intervention by a third party or parties and without any intervening action or negligence on her part," because it is confusing. We have already put in the requirement that her losses must have been sustained solely through the recommendations and reliance thereon, and consequently to state the opposite side of it merely confuses the issue.

I have doubts in my mind about two parts and I would like to hear the plaintiff's position on them. In the first page in the first paragraph toward the end of the paragraph the phrase "acting with ordinary prudence in reliance on those recommendations."

MR. BLUM: I do object to that, your Honor. I was always taught that there were five fingers to fraud and in these charges I count six. I think it is sufficient to show that she relied on the recommendations. I don't know what acting with ordinary prudence means.

THE COURT: I am reasonably sure with respect to security charge, her ordinary prudence had nothing to do with it. I am not entirely certain on the state common law count that ordinary prudence may not be a part of it.

MR. BLUM: My understanding is that so far as the elements are concerned -- I brought PJI with me on fraud.

THE COURT: I am looking at it now. Defendant also has it "defendant relied and had a right to rely," which connotes prudence again.

We had an instruction on common law fraud which says that whether the person to whom a recommendation is made is justified in relying on it depends upon whether the fact represented is one that a reasonable man would consider important in reaching a decision in the transaction in question. So that does connote prudence.

MR. BLUM: I would have no objection if in lieu of these abbreviated forms you were to direct the Court with the language which appears in PJI so far as common law fraud is concerned. Why not just read it off the treatise?

THE COURT: What do you say to that, Mr. Goldstein?

MR. GOLDSTEIN: I think the way I worded it is a little clearer. I think this gets into a lot of alternatives.

THE COURT: It is unfortunately long.

MR. BLUM: Covers the bases. They basically say if a reasonable person would rely on it, or if the alleged fraud doer had reason to believe she would rely on it, then reliance is satisfied. I think that's basically appropriate. It is one sentence.

THE COURT: I will change "ordinary prudence" to read "acting as a reasonable man would in reaching a decision."

MR. BLUM: That's fine.

MR. GOLDSTEIN: I have no problem with that.

Turning to the last page and the last paragraph again --

MR. GOLDSTEIN: Your Honor, Mrs. Bodner raised a point which might have some validity. If instead of "reasonable man" you could say "reasonable woman."

MS. BODNER: No, "person."

THE COURT: I still view "man" as being a neuter word speaking of mankind.

MS. BODNER: It is more neutral, and since she is a woman --

THE COURT: Now, look at paragraph 2 on page 5. How do you think that should be corrected?

MR. GOLDSTEIN: In view of the supplemental memorandum I put in, I think scienter is an important part and they must find first that the facts, if any, that were misrepresented had to be material to the qualification. For instance, if there was some misrepresentation on a minor point and if they further find --

THE COURT: I am talking about the phrase "right to rely."

MR. GOLDSTEIN: I think that would be important in view of the testimony that she had an attorney or a son and had two nephews, or at least one nephew --

THE COURT: We are not talking facts, we are talking law. Does one in a security fraud have to prove reliance?

MR. GOLDSTEIN: Yes.

MR. BLUM: I think those words should come out, your Honor.

THE COURT: That's my recollection, also.

I am reasonably sure that in a securities case, the reasonableness of the reliance does not have to be proven.

MR. BLUM: That is my understanding as well, your Honor.

THE COURT: However, we will look into that.

Now, with respect to the plaintiff's requests --

MR. BLUM: If I may interrupt, do you want me to respond if I have any question?

THE COURT: Yes.

MR. BLUM: I think the first paragraph and the repetition in the third paragraph of this "failure-to-request" language is maybe misleading to the jury. I think the plaintiff's testimony was she said, and Miss Emerson's testimony to the extent it has been read in, said that what she said was that she did not -- she told him that she did not understand.

THE COURT: Which page, which paragraph?

MR. BLUM: In the supplemental charge, page 1, first paragraph. It says "plaintiff testifies that although she claims that she did not understand."

You will recall that Miss Emerson's testimony, which has been read in, and Mrs. Grupe herself has testified that she said she didn't understand it, and also that Miss Emerson said she said, and I think I can quote the language almost exactly, she said, "You must understand I studied English and not economics and I am trusting in you, John."

Now, I think --

THE COURT: Can you bring this down to some point?

MR. BLUM: Yes. I think the statement is incorrect in that second sentence, "Plaintiff testified that although she claimed she did not understand all he was saying" --

THE COURT: Isn't there an issue there in that the defendant claims they didn't understand, and he went over it in great detail?

MR. BLUM: The next sentence says she did not question him or ask him to explain further. That is misleading unless that language also says "although she advised him that she did not understand economic matters and was relying upon him." That, by golly, has been said repeatedly. It's been said repeatedly she said it at the time. I think it's misleading otherwise.

THE COURT: I don't know this sentence is necessary in any event.

MR. BLUM: It is picked up, also, your Honor, and that's the particular vice of it, it's picked up two paragraphs down where she says "plaintiff's failure to question him" --

It is before the jury she said, "I don't understand economics and I am relying on you."

MR. GOLDSTEIN: There was also testimony brought out with my example of Mrs. Grupe being a teacher that she sat mute through a lot of this while he was talking to her and didn't say anthing, and I repeatedly asked her, "Well, didn't he have a right to assume that you knew what he was talking about?" Assuming she said "I don't know economics, I don't understand it," obviously he was then trying to explain it to her and she then sat there.

MR. BLUM: Isn't that explanation rather than instruction to the jury?

THE COURT: The issue being put to the jury on the standpoint of scienter is whether, even assuming that in fact the plaintiff didn't understand any of this, the defendant reasonably assumed that she did because she didn't raise any questions about it.

MR. BLUM: I don't see it has anything to do with scienter. It may have something to do with the question of reliance, but scienter is whether or not he intended to deceive or manipulate her. The question here -- I have no objection to a charge on scienter --

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Which question does this tie into, Mr. Goldstein, supplemental charge?

MR. BLUM: I think I can answer that, your Honor.

MR. GOLDSTEIN: At the time I wrote it, I didn't have them.

THE COURT: Look at them now and see what it ties into.

MR. BLUM: All of these B questions were separated out starting at 3, your Honor. There is a series of them, 1, 2, 3-B. As I originally drafted those, they were all one with the words "with intent to deceive" included in them. Mr. Goldstein asked yesterday they be rewritten with the fact separated from Mr. Lamula's intent to deceive.

THE COURT: You are not helping me in the slightest.

MR. BLUM: In every instance the scienter relates to the B questions, 3-B, 4-B, 5-B, 6-B.

THE COURT: Mr. Goldstein is supposed to tell me which question the supplemental charge pertains to.

MR. GOLDSTEIN: From a fast look through this,

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I don't know if there is any specific charge it might refer to. I think it refers to the overall view of this, that, for instance, presumably if Mr. Lamula had gone up to a point and he thought Mrs. Grupe understood, he might not then proceed to tell her something else which he would have told her if she had said she had not understood it.

If she understood A, perhaps there was no need to go to B. If she had not understood A, perhaps then he would have gone to B as an explanation. For instance, if she mentioned rating services and she didn't say anything --

THE COURT: Well, I think the trouble with your supplemental charge which initially Mr. Blum indicated he had no objection to but now says he has objection to, and I see why in the last sentence. Your basis for this charge is the Ernst & Ernst case which deals with scienter, but you wind up making a constructive possession of knowledge on the plaintiff's part by her failure to indicate a lack of knowledge, and I don't think that comes out of Ernst & Ernst.

MR. BLUM: I hope I didn't imply consent to it. I said I had no objection to a charge of scienter because I think that we do have to prove scienter.

THE COURT: I think the last two lines on this have to be changed to conform to the Ernst & Ernst conclusion rather than the conclusion it runs out to.

MR. BLUM: Then the beginning has to be changed.

THE COURT: I am leaving out the second sentence in the first paragraph.

MR. BLUM: In analyzing it, your Honor, it runs past that. Ernst & Ernst arose out of that first securities scandal in Chicago and what happened there --

THE COURT: Let's not get a lot of argument into the record here.

MR. BLUM: I don't mean to address it to argument, but what I am saying is this entire charge is not -- there is nothing in this charge that is a scienter charge. Scienter involves the question very simply whether or not Mr. Lamula intended to deceive Mrs. Grupe, and there isn't a line in here about that. If he stops short at a certain point, that doesn't have anything to do with whether or not he was trying to trick her.

THE COURT: I think her intelligence, her background, and her behavior are evidentiary of whether he was trying to deceive her. I think you can consider that. I grant you it is his state of mind that counts, but in dealing with his state of mind, you have to take into account who he was dealing with and how he was dealing with her.

MR. BLUM: Doesn't that run to the reliance element, whether or not she reasonably relied --

THE COURT: It also goes to reliance, but it has a bearing on scienter. Let me put it to you this way: If the evidence was that he was dealing with a totally uneducated person and he just rattled all of these things off, the jury would have much stronger ground for believing that he was attempting to deceive her than if, as is the fact, he was dealing with an educated person and she was not asking him any questions indicating she didn't understand what he was talking about.

MR. BLUM: Your Honor, again, with respect, I am not aware of a single case in the 10(b)(5) area, and particularly in the area of customers, and I think I have read most of them by now, where that point has been made. I am not saying it is not valid. The way in which it is usually approached, you find cases like Oper v. Hancock Securities in which Judge Frankel looked at it and said even there where you had a really sophisticated investor who was jobbed by a marketmaker, you could find intent to deceive and fraud practiced on him.

I don't find this, or any other cases I have seen where somebody has used this relevant piece for that subject. I think they all say it is relevant to reliance rather than relevant to scienter.

THE COURT: In any event, I can't give it as it is now unless it has been corrected to follow the Ernst & Ernst case, which it presently isn't, so you are going to have to give me the last two lines in different language, Mr. Goldstein.

MR. GOLDSTEIN: OK.

THE COURT: Because your memo of law relies solely on Ernst & Ernst.

Very briefly, and I have to go do something else to try to readjust my schedule to meet these changes you have wrought, I will tell you what I am doing with plaintiff's extremely lengthy requests to charge. I haven't counted the number of pages, but they are very lengthy.

I am not going to give most of the first paragraph of the first request. It is not a charge. It is a lecture on the reason for the law.

I am not going to give the charge involving market price because it is not an issue in the case, at least within those terms. There has been no testimony he ever told her about looking at the market for prices.

I am not going to put in the editorializing on thin market. With respect to that and many other charges where the word "must" is put in, that you must consider these omissions to be material, it is going to be put in the terms of they may.

MR. BLUM: I have your Honor's direction with regard to markup.

THE COURT: Yes, you have several charges with respect to markup and markup per se is not a legal issue in the case. The defendants' position is that this was not a riskless transaction, and he was selling from inventory and markup was not an issue. Consequently, all we need is a single charge to the effect of, or after they made a determination as to whether in fact he was selling from inventory or not, if they determine that he was not selling from inventory, then what should have been the proper charge, either commission or markup, as contrasted to what in fact was charged.

MR. BLUM: Again, I have to disagree with the Court when you say that markup is not in issue. It seems to me markup is very much in issue.

THE COURT: It is factually in issue, but it is not legally in issue. He acknowledges that 5 percent is a proper markup. He also says that if he was selling as a

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broker, he would have charged a $10-a-bond commission, which would have produced a total commission in the neighborhood of $1,600. They are not arguing all these legal issues you are raising concerning markup. They are saying factually you are wrong.

Consequently, for me to dwell on seven lengthy charges on markup under the factual contentions would be to stress legal contentions that aren't present.

MR. BLUM: Are you saying the question is you must determine whether or not there was a markup?

THE COURT: No. "You must determine whether or not, as he claims, he was selling from inventory, and was therefore entitled to take a profit. You must determine also, if that is the case, whether the profit he took was the market price then existing, as he claims, obtained by Minnie Vena on telephone calls. But if you find that either he was not selling from inventory as claimed, or that even if he was, the claimed market prices were not as set down on the blue sheets by Mrs. Vena, then he should only have taken a commission or a markup of" -- and go on from there.

It is a factual issue, not a legal issue.

I am also not going to charge the other material factors request. It is much too broad.

MR. GOLDSTEIN: Is your Honor referring to the investment objectives?

THE COURT: It is headed "other material factors."

MR. BLUM: That raises a question, your Honor.

THE COURT: Stop a moment, please.

MR. BLUM: I am sorry, I thought you wanted me to raise it now.

THE COURT: I am going to reword somewhat a number of these. I am not going to give the first paragraph of the charge under "joint and several liability of defendants," nor the last sentence on that page, because I feel it is confusing, and I don't think there is any great issue as to whether, assuming they find against Mr. Lamula, they do not also have to find against the corporation for these purposes; that the two are virtually one.

I am not going to give the charge entitled "supporting authorities."

MR. BLUM: That wasn't meant to be a charge. That was the first charge I prepared on this, your Honor, and I altered my format. I thought it was the easiest question, too.

THE COURT: I will throw in, however, in place of what I have taken out in the preceding charge the last portion of that commencing with "a brokerage firm is itself liable," since that is better language than what you have on the preceding page, which I have eliminated.

Now, I will also consider later on, Mr. Goldstein, any objections you have to the other charges that I haven't mentioned, and at that time I will hear from Mr. Blum on his efforts to reconstruct some of the charges.

We will adjourn now for lunch.

(Luncheon recess)

AFTERNOON SESSION

1:40 p.m.

(In open court; jury present)

THE COURT: Call your next witness.

MR. GOLDSTEIN: Dorothy Emerson.

DOROTHY EMERSON, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Miss Emerson --

A I am sorry, you will have to speak louder.

A OK.

Miss Emerson, where do you live?

A Cayuga, New York. C-a-y-u-g-a.

Q And have you been ill recently?

A All summer.

Q When were you first -- strike that.

Did you have to get permission from your doctor to come down here?

A Yesterday morning --

MR. BLUM: I will waive all this. I don't want to tax the witness with that. I assume she was ill and made a great effort to be here. In order to spare you, there is no reason for questions of that order, if it is all right with Mr. Goldstein.

MR. GOLDSTEIN: Fine.

Q Miss Emerson, you introduced Mr. Lamula to Mrs. Grupe, did you not?

A I did.

Q And you were present when certain meetings took place in the spring of 1974?

A I was.

Q Approximately how many meetings did you attend between Mr. Lamula and Mrs. Grupe in the spring of 1974?

A About once or twice, sometimes twice a week, from March until May and June.

Q Were you working at that time in Albany?

A Yes.

Q What was your position?

A I was in charge of one of the departments in the state senate.

Q And how long had you been working at that job?

A Oh, not exactly the same one, but the same work, the same thing, for well over thirty years.

Q Prior to 1974, approximately how long had you known John Lamula?

A Prior to 1934?

Q 1974.

A Oh. Well, I had known him before 19-- I know him from about 1934 or '35 in campaigns.

Q Were you aware of his reputation for honesty?

A Oh, yes.

Q What was that reputation?

MR. BLUM: Your Honor, is that in issue here? Is this an appropriate question? I object to it.

THE COURT: I think honesty is an appropriate issue in the case. You have accused the man of fraud.

MR. BLUM: His general reputation for honesty?

THE COURT: No, his honesty is an issue in the case.

MR. BLUM: I thought we were talking about specifics. I withdraw the objection.

Q What was his reputation for honesty?

A Above reproach completely as far as the legislature and the people who were there.

Q Had you invested with Mr. Lamula before 1974?

A Yes.

Q For approximately how long a time?

A Well, I don't know when I first did, but this was quite a long time ago. Of course, I don't have a great deal of money to invest, but whenever I did have it, he did the investing for me. I had my own attorney, in upstate who was president of one of the banks up there investigate each one of them because John asked me to do it, and I did.

Q Isn't it a fact you held some of the very debentures that Mrs. Grupe purchased in May 1974?

A I still hold one of them. The other one was sold quite recently.

Q During these meetings, if you will remember, in May 1974, first of all, where did these meetings take place?

A Where did they take place?

Q Yes.

A In Albany.

Q Where?

A In my room. I had an apartment in the DeWitt Clinton Hotel, and they all took place there.

Q During these meetings, did Mr. Lamula go over the various debentures that he was recommending to Mrs. Grupe with Mrs. Grupe?

A Oh, yes.

Q At any time after May 1974 -- strike that.

You were very friendly with Mrs. Grupe during this period of time?

A Yes. Very fond.

Q Do you still consider her your friend?

A Certainly I do.

Q During the spring and summer of 1974, did you speak to her fairly frequently?

A We lived in the same hotel. I had an apartment and she had a room. Naturally, I would ask her to my place for dinner.

Q At any time during the spring or summer of 1974, did Mrs. Grupe ever tell you that Mr. Lamula had purchased securities for her without her knowledge?

MR. BLUM: Objection, your Honor. I think this is rather extensive leading of the witness.

THE COURT: It is. Rephrase the question.

Q During the spring and summer of 1974, did Mrs. Grupe ever complain to you about any investments that Mr. Lan[illegible]a had made for her?

MR. BLUM: Again, I think the same objection is appropriate.

THE COURT: I will allow it. Did she complain?

THE WITNESS: Oh, no.

MR. GOLDSTEIN: I have no further questions.

THE COURT: Cross-examination.

MR. BLUM: Only one set, your Honor.

CROSS-EXAMINATION

BY MR. BLUM:

Q Miss Emerson, I am going to show you a document which was marked in evidence as Plaintiff's Exhibit 20, and ask you if you have seen this document before.

A Oh, yes.

Q When did you see it before?

A The last time I saw it was -- I don't know what date it was.

Q The last time you saw it was at the deposition we had in the courthouse, is that right?

A Yes. I don't recall the exact date.

Q Do you recall the testimony that you gave with regard to that document as to when you first saw it?

A Yes. This or a copy of it was the plan that Mr. Lamula had made, and I saw it then.

Q Isn't this document, Plaintiff's Exhibit 20, a sheet that Mr. Lamula showed to Mrs. Grupe sometime before she said, "Go ahead and buy the securities"?

A Oh, yes. This was what she had wanted.

Q Well --

A I think you will find I stated that in there.

Q I think you did. I am just looking for that part.

A Because that is right.

Q Yes. In the interests of sparing your voice, let me read this to you and ask you if this is still your testimony today. I am referring to page 18.

"Did he review a lot of these documents with Mrs. Grupe?"

Forgive me, once again, these were questions asked by Mr Goldstein.

A I can't hear.

Q These were questions Mr. Goldstein asked you when we met in the Auburn courthouse at your deposition. I am reading it to you, and my question is, would your testimony today be substantially the same?

"Q Did he review a lot of these documents with Mrs. Grupe?

"A Oh, yes. And he brought up -- this was late, but he brought up a chart at least this large" -- and you indicated -- "and it had a list of the proposed bonds, that was the first column, and the second column were the number and then I think there was a third column which was the amount of yearly interest, and then all the columns were divided into months and carried out into each month. It was the date that the interest was paid and how much it was, and he told her to study that."

Then the next question: "I show you this document previously marked into identification as Plaintiff's Exhibit 20 and ask you if you recognize it.

"A Yes. That was it.

"Q This is just for identification.

"A Yes, that is it. I think I am right, and the interest here (indicating).

"Q This is a column you say you remember?

"A Yes, that was it.

"Q Now, did Mr. Lamula give this to the plaintiff to study at one of these meetings?

"A Yes."

Is that substantially correct?

A That's correct.

MR. BLUM: I have no further questions, your Honor.

MR. GOLDSTEIN: I have no questions.

THE WITNESS: It may not be this exact piece of paper. This may be a copy.

MR. BLUM: I think counsel will stipulate that is Plaintiff's 20 which was the subject under discussion.

MR. GOLDSTEIN: Yes.

I have no questions.

MR. BLUM: No further questions.

THE COURT: The witness is excused.

(Witness excused)

THE COURT: Mr. Goldstein, do you have any further witnesses?

MR. GOLDSTEIN: No, your Honor. The defendants rest.

MR. BLUM: Your Honor, I have an application to the Court at this time which might best be made out of the presence of the jury.

THE COURT: All right. We will excuse the jury.

(In open court; jury not present)

MR. BLUM: Your Honor, at this time, plaintiff moves for an order and for a verdict directed on her complaint in respect of each of the counts. Further, she moves for an order striking the affirmative defenses. We move on every count which is contained in the complaint and on each of the causes of action stated.

THE COURT: How many counts are there in the complaint?

MR. BLUM: There are three counts in the complaint. They allege -- I believe there are three counts in the complaint, and they refer to the purported fraudulent behavior of the defendants in the manner in which these securities were sold and in the suitability of the securities and they relate also to the breaches of fiduciary duty which were involved in the alleged taking of advantage of Mrs. Grupe's unsophistication and lack of knowledge in the securities industry, and they also charge excessive markup, and I accept the Court's amendation to that, that it is in effect a claim that an excessive price was charged by Mr. Lamula and his firm to Mrs. Grupe.

We believe that we have shown not only by a preponderance of the credible evidence that what is alleged there and stated as the issues in the pretrial order, which plaintiff intends to prove, have been thoroughly shown, your Honor; that there is no credible evidence with respect to -- there is no credible evidence that these securities were suitable.

There is no credible evidence that Mr. Lamula properly advised Mrs. Grupe as to the various factors which related to their safety, and their suitability; that there is no credible evidence to support his contention that the pricing which occurred was not a deliberate effort to maximize profit without regard to the obligations which relate to the charges and which are imposed under the securities laws and the JASD and common law principles of fraud and breach of fiduciary dity.

We believe that there has been no evidence submitted whatever to demonstrate any impropriety in the marketing of these debentures after Mrs. Grupe was advised as to their true nature, and there has been no evidence whatever submitted that she was motivated in any fashion or by anything other than a desire to rid herself of securities which she had been advised repeatedly and urgently she should not continue to hold because they were unsafe and unsuitable at the time.

Therefore, I renew my application that a verdict be directed in plaintiff's favor and against defendants in all respects.

MR. GOLDSTEIN: Your Honor, in response, I think we have indicated that there is a question of issue for the jury as to whether or not the prices charged Mrs. Grupe were correct or not. They could either believe that the yellow sheets are sacrosanct and that those are the prices that could be charged, or they could accept Mrs. Vena's testimony that those were the prices quoted to her.

In any event, that would be a question solely for the jury to decide.

In addition, as far as impropriety, Mr. Lamula has testified, and I think Mr. Rowney has backed him up to that extent, August was a very bad month. There is some question whether these were junk bonds. If they were not junk bonds -- and I use plaintiff's phrase without acknowledging that that is the term properly used -- if they were not junk bonds, then there should not have been a sale at a loss, because she testified she was receiving the interest. There was nothing to make anybody think at that time that she wouldn't continue to receive the interest.

On the other hand, if they were junk bonds, then even then perhaps they acted precipitously in selling them.

There is a question of whether they did get the best price as witness their own charts, which however below the yellow sheets they were, they still showed a differentiation in several areas.

THE COURT: You are trying to ride both horses, saying the yellow sheet prices are not sacrosanct, and yet when they didn't get the yellow sheet prices --

MR. GOLDSTEIN: They could find they are or are not valid. Either way, it is a decision they are going to have to make.

I would renew defendant's motion at this time for a dismissal of the fraud counts on the grounds that the plaintiff has not shown there was any misrepresentation, and if there was incorrect advice given, shall we say, they have not shown it was recklessly made with a disregard for the truth or Mr. Lamula should have known the information he was giving her was false or that it was given for the purpose of deceiving the plaintiff.

THE COURT: You speak of three causes of action, Mr. Blum.

MR. BLUM: I thought there were three, your Honor.

THE COURT: There are three stated, but it seems to me that you have four causes of action. Your first cause of action seems to combine a poor suitability claim with a securities fraud 10(b)(5) kind of claim.

MR. BLUM: That is correct. Perhaps a more accurate reference would be the pretrial order where we stated the issues because this was done, of course, before any discovery had occurred, and based upon the thinnest possible information.

Again, I think the claims with regard to liability appear commencing at page 16, and I believe that they fundamentally broke them into two groups, one which related to the manner of selling and the suitability of the securities, and the second, which related to the price that was charged.

If I were to -- I call them counts, but if I put causes of action denominations on them, your Honor, I would say there are seven or eight because of the common or pendent claims under state law. In broad categories there are probably -- let's see, there is a statutory fraud in the suitability question which also involves the NASD rules; there is a statutory fraud for omissions and misrepresentations; and there is common law fraud with respect to both of these.

There is also the claim of breach of fiduciary duty with respect to those. Then with regard to the pricing. Each of those again appears as a cause of action.

THE COURT: You don't have a joint statement of issues in this pretrial order, which makes it quite difficult to approach. However --

MR. BLUM: I made an effort, your Honor.

THE COURT: Working backwards, the common law fraud count motion is denied as presenting a jury question.

MR. BLUM: You are saying there is a jury question?

THE COURT: Yes. The securities fraud count motion is denied as presenting a jury question.

The suitability motion is denied as presenting a jury question.

The pricing claim has two aspects, one being the question of whether it was a sale from inventory, and the other being whether the market price was as claimed. I am going to reserve decision on the pricing aspect.

MR. BLUM: With regard to the motion which I also made, your Honor, that the affirmative defenses be dismissed, I just haven't seen one shred of evidence with regard to the claim that there was anything improper about the way in which these securities were sold or that the reason for which they were sold was improper.

MR. GOLDSTEIN: With regard to the first affirmative defense, we have agreed that that is withdrawn, and that so states in the pretrial order.

The second affirmative defense states the plaintiff purposely and wilfully sold the securities, allegedly took a loss at the lowest bid price. I think that is indicated in several instances on the chart Mr. Blum produced, that they did sell at the lowest prices.

THE COURT: You say for the sole purpose of being able to commence this action. I am going to reserve decision on that. There is very little evidence to support that contention.

How about the plaintiff never requested or demanded any of her money back prior to the alleged sale of the securities at a loss?

MR. BLUM: I was addressing myself to the issues as defined by page 25 of the pretrial order.

THE COURT: Unfortunately, page 25 --

MR. BLUM: Contains the two claims of the defendant with regard to liability.

THE COURT: It appears under "contention." I don't rule on contentions. I rule on issues.

MR. BLUM: I think the evidence clearly establishes she requested Mr. Lamula to dispose of the securities.

THE COURT: He hedged a bit. He said she talked to him about selling them but he told her not to sell them.

MR. BLUM: He said he thought it would be a tragic mistake if she were to do it, but I don't think there is any question she requested him to dispose of them.

MR. GOLDSTEIN: He also said if she was really set upon it, he would do it over a period of time so she wouldn't lose money, and she didn't take him up on that offer.

THE COURT: I will reserve decision on that.

MR. GOLDSTEIN: The fourth defense is merely a question of whether she knew the prices of the securities would fluctuate.

THE COURT: Factually, I think you are correct, but I don't know as a matter of law it is a defense.

MR. BLUM: I would move at this time that be stricken, your Honor.

THE COURT: I will grant that motion because I don't think that states a defense. You are factually correct that she knows securities vary in price.

MR. BLUM: I concede she knows that securities vary in price.

THE COURT: And that they don't always go up, sometimes they go down, but I don't think that states a defense.

MR. BLUM: Your Honor, at this point I have one rebuttal witness.

THE COURT: We will take a brief recess.

(Recess)

(In open court; jury present)

THE COURT: Is there a rebuttal witness?

MR. BLUM: Yes, there is, your Honor.

I call John Angelo.

JOHN ANGELO, called as a witness by the plaintiff, in rebuttal, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BLUM:

Q Mr. Angelo, where are you employed?

A Presently at L. F. Rothschild & Co.

Q In what capacity are you employed there?

A I am a partner in the arbitrage department.

Q What is arbitrage?

A Arbitrage, in layman's terms, is taking advantage of price fluctuations from one market to another.

Q Let me see if I understand it. That is a dealer in the variations of prices in securities?

A That's correct.

Q Let's get a little background. What was your educational background, Mr. Angelo?

A I went to Riverdale Country Day in the Bronx and I went to Saint Lawrence University.

Q I didn't know you had gone to Riverdale. So did I.

When did you graduate from Saint Lawrence University?

A 1963.

Q And what did you then do?

A I was in the service for two years.

Q Following that, where were you employed?

A In 1966 I worked at Cowan & Co. for four years.

Q What is Cowan & Co.?

A They are bond brokers.

Q Are they a member firm of the New York Stock Exchange?

A Yes, they are.

Q Are they also registered with the National Association of Securities Dealers?

A Yes, they are.

Q Are you yourself registered with both of these organizations?

A Yes, I am.

Q When did you leave Cowan & Co.?

A In the summer of 1970.

Q What were your duties at Cowan & Co.?

A Initially, I was a bond clerk on the floor of the New York Stock Exchange and then later on I became a trader on the upstairs, on the desk, performing duties similar to what I do today, somewhat similar.

Q When you left Cowan, where did you go?

A To Bear, Stearns & Co.

Q And how long were you there?

A One year.

Q Did you continue to do at Bear, Stearns the same kind of work which you now do and had done in the latter part of your Cowan service?

A Yes. Basically, yes.

Q Does your arbitrage responsibility require you to trade or deal in or with convertible debentures?

A Yes, it does.

Q Do you in addition to arbitrage work handle straight transactions, trades in convertible debentures?

A Yes, I do.

Q Are you in charge of that servcie for your firm?

A Yes, I am.

Q Can you tell me in the year 1974 -- withdrawn.

Now, based on your experience in this field, can you tell me what meaning the term "junk bond" has in the securities industry?

A It is a general term but it is usually applicable to bonds that are BAA or less. That is, rated BAA or less.

Q In your understanding, then, a junk bond could well be paying interest?

A Oh, absolutely. More often than not does pay interest.

Q In the course of performing these services, you of course have been involved in trading with junk bonds, have you not?

A Yes.

Q With convertible debentures of BAA or lower grades?

A Absolutely.

Q In the year 1974, to the best of your recollection, can you estimate for us the total of transactions in convertible debentures of that type which took place, which were handled by you or under your supervision?

A For the period of that year?

Q For the year 1974. Approximate it for us?

A As much as 200 million, in face value of bonds.

Q Some 200 million in face value?

A Right.

Q Now, did there come a time in the summer of 1974 when you received a telephone call from Robert Loeb with regard to debentures of the companies listed on the chart displayed on the board? And I am referring to the chart labeled Plaintiff's 151 in evidence.

A Yes.

Q To the best of your recollection, when during the summer do you first recall having discussed these with Mr. Loeb?

A I would say sometime in August of 1974.

Q Can you recall for us what that conversation was?

A There were two conversations. The first conversation was that Mr. Loeb called me and read me a list of bonds --

MR. GOLDSTEIN: I object on the ground it is hearsay what Mr. Loeb told him

THE COURT: It is.

MR. BLUM: The door was opened by the questions asked by Mr. Goldstein during his testimony. He specifically asked what Mr. Angelo said to him and what he said to Mr. Angelo.

THE COURT: It is possible he did. I do know Mr. Loeb testified what he told Mr. Angelo, so we have got that side of it in. Why do we need it again?

MR. BLUM: Perhaps I can refresh your Honor's recollection. Mr. Loeb testified, if I remember correctly, that he asked Mr. Angelo how Mr. Angelo regarded these debentures, and he said what Mr. Angelo's response was.

THE COURT: Perhaps he did, but why must we get it in again? You are going to tell us now about Mr. Loeb's request to you concerning these bonds. He wanted to know about the bonds. He told us you were a super trader and he wanted your opinion of the bonds. This is the gentleman characterized as a super trader.

MR. BLUM: That's the one.

THE COURT: All right.

Q Did you give Mr. Loeb your opinion of these debentures?

A Yes, I did.

Q At some subsequent time a second conversation occurred, is that correct?

A That's correct.

Q What did you say in that -- is it correct that Mr. Loeb called you in that second conversation and asked you to dispose, to sell these?

A Yes, it is.

Q What did he say in that conversation?

MR. GOLDSTEIN: Objection.

MR. BLUM: Here we have had direct testimony.

THE COURT: Why go over it again? He told us what he said. What is the purpose of repeating it?

MR. BLUM: I made an application out of the presence of the jury directed at certain affirmative defenses on which the Court reserved decision. It seemed to me appropriate in rebuttal perhaps to eliminate any doubt which remained in the Court's mind on the subject.

THE COURT: All right, I will allow it, but I really don't know why we are going over it again.

Did you hear the question?

THE WITNESS: Yes. I am sorry, would you repeat it again?

(Question read)

MR. BLUM: I will withdraw the question.

Q Following that second conversation, did you yourself have anything to do with the sale of these debentures?

A Yes. I sold all of them.

THE COURT: I now recall he did say, without objection from Mr. Goldstein, he wanted to sell them on a commission basis and didn't want to take them into inventory.

MR. BLUM: That's correct.

Q I show you a packet of exhibits collectively labeled Plaintiff's Exhibit 45 in evidence. I ask you if they represent the sales transactions which you effected with regard to these debentures.

A Yes, they are.

Q Were there any discussions that you had with Mr. Loeb with respect to the manner in which these sales were to occur?

A Yes. We felt that it would be advisable to sell them less -- that's a fairly technical term -- less commission as opposed to taking them as the owners into inventory.

Q Can you speak a little louder so the jury can hear?

A Mr. Loeb and I felt that it would be safer if we sold these bonds with a commission as opposed to taking them into inventory and then selling them out of inventory so that no -- so that if there was ever any litigation, it would be shown the amount of money L. F. Rothschild was to make on the transaction.

Q What in fact was the commission rate which L. F. Rothschild charged?

A We charged $5 a bond, which at that time was our standard rate.

Q How did you go about actually selling these, if you recall? Do you recall the actual phone conversations you had with respect to the -- or the steps you went through in effecting the sale?

A I don't recall specifically on every trade what I might have done. I know generally what I would have done on all of these trades or any other trade that I might have had.

Q Let me ask this then. Was the manner in which you went about disposing of these -- that is, selling them -- in accordance with your usual practice?

A Absolutely.

Q Was it in accordance with the practice which in your experience is usually followed by traders in such debentures in disposing of bonds?

A I don't think there is any other way that one might do it.

Q Would you tell us what that way was which was your usual way and which you believe applied here? What did you do?

A There are sheets called "yellow sheets" --

Q The jury is familiar with the term.

A OK. -- where the markets and marketmakers would be shown within the sheets, and I would call every one of those marketmakers and ask for that market, and after telling me what their market was, since I was a seller I would sell the amount of bonds described to the highest bidder.

MR. BLUM: May I ask that Exhibit 165, which is in evidence, be distributed again to the Court and jury?

THE COURT: Yes.

MR. BLUM: Mr. Goldstein, we have added to each of these sheets, or my assistant added to each of these sheets a description of the amounts which you have stipulated that was spent -- or the prices at which John Lamula Investors acquired each of these and the dates, except for those which the Court directed should not be included. Since that information is there, do you have any objection to the use of this? It is all in the pretrial order stipulations.

MR. GOLDSTEIN: I would like to see it in different form, but I have no objection to this, your Honor.

THE COURT: All right.

Q Let me offer this copy to you. Now, again, in the interest of doing this rapidly, you and I reviewed this last night, did we not?

A Yes, we did.

Q The prices which appear at the foot of each sheet, that is, what John Lamula Investors actually paid for each one of these, was not on the sheet at the time, but I showed you that information; did I not?

A Yes.

Q Based on your experience in the trading and in the purchasing and selling bonds and debentures of the order involved here, I ask you whether it is credible to you that the numbers shown as the quotations on the order tickets of Allegheny Beverage are quotations which were made by Murphy & Durieu, Wechsler & Krumholz and Carl Marks & Co.

MR. GOLDSTEIN: I object to the question as to form and also I don't think this witness has been qualified as an expert to make such an opinion.

MR. BLUM: As to the qualifications as an expert, I think he has amply demonstrated his qualifications. As to the subject matter, I believe the form is proper.

THE COURT: I think the use of the word "credible" is inappropriate. I think you should phrase it differently.

MR. BLUM: Then let me ask it this way:

Q Based upon your experience, do you regard it as usual or unusual to find a difference as great as that indicated in the column marked order ticket quotes on 5/23 from those indicated in the yellow sheet listings for the four following days?

MR. GOLDSTEIN: Again, I would ask the Court at this time to determine whether or not the witness is qualified expert in order to be able to answer that question.

THE COURT: I think he has indicated his qualifications earlier. If you want voir dire on qualifications, you may have it now.

MR. GOLDSTEIN: If I may, your Honor.

VOIR DIRE EXAMINATION

BY MR. GOLDSTEIN:

Q How long have you -- strike that.

Prior to 1974, how long had you been trading in over-the-counter stocks and securities?

A Do you mean stocks or do you mean bonds?

Q Securities over-the-counter.

A Since 1969.

Q During that time, had you actually been making the trades?

A Absolutely.

Q Calling up, getting prices, etc.?

A Absolutely.

MR. GOLDSTEIN: OK. I will withdraw my objection, your Honor.

THE COURT: Read the question back.

(Question read)

MR. GOLDSTEIN: Are you speaking solely about

Allegheny now?

MR. BLUM: Yes. By "the four following days," I mean the four days next listed on Exhibit 165, May 21 through May 24.

BY MR. BLUM:

Q Do you find that a usual or an unusual difference

A Unusual.

Q The same would be true, would it not, with regard to Wechsler & Krumholz?

A Yes.

Q Is it true also with respect to differences indicated for Carl Marks & Co.?

A Yes.

Q In your experience, is it usual or unusual for a marketmaker over-the-counter to be in the sheets at a price of 43-48 on alternate days and to sell the same securities at 59?

A Unusual.

Q Slightly unusual or very unusual?

A Very unusual.

Q The next sheet of course there are no quotations, so we will turn the next two pages, and that brings us to Arwood Corporation. There, looking at the Murphy & Durieu column, do you regard the prices shown on the order tickets as -- shown as quotes on the order tickets as unusually or usually higher than the quotations shown on May 23 and 24?

A It is unusual. It is not very unusual.

Q Well, with regard to the next one, Inflight Services, where Wechsler & Krumholz had bid 28-31 for two days and then 27-30 for the next two days, do you find it unusual that there is an indication that they quoted 36-41 at the middle of that period?

A Very unusual.

Q And is it very unusual, also, to see the quitation indicated for Murphy & Durieu?

A Yes, it is.

THE COURT: Incidentally, Mr. Blum, I think you have mislabeled these exhibits. It is something Mr. Goldstein should have caught. The additions you hav- made at the bottom you have put them down as purchase dates when in fact they are settlement dates.

MR. BLUM: Yes, Thank you, your Honor.

THE COURT: So every place it says "purchased," it really means "settlement." As you have heard from the testimony, you purchase on a given day, but it takes a week or eight days before the transaction is completed by the exchange of the bond, and the dates that appear here are not the purchase dates, but the later settlement dates.

The purchase dates preceded this by some seven or eight days.

MR. BLUM: I think counsel have agreed that the purchase dates which are shown here as May 29 are transactions which in fact occurred on Mr. Lamula's records on May 21.

MR. GOLDSTEIN: That's correct.

Q Now, going to Lincoln Mortgage Investors, do you find the quotations shown for Wagenseller & Durst of 52-57 as being unusually different from the yellow sheet listings of 40 to 50 which appear from May 21 to May 24?

A Yes.

Q Very unusual?

A In this instance I find it unusual, not very unusual. The other two firms don't have any markets, and Wagenseller is probably not a name that would come out very often and they never change their market, which is an indication they might never have changed their card, so it is unusual.

Q Stopping on that one for a moment, do you find it usual or unusual that a broker-dealer, a market-maker, it is in the sheets across the same period for none and then 40-48, and then none and then 40-48, should, in the middle of that period sell twenty of these debentures for 56?

A Yes.

Q Is that unusual or very unusual?

A That is very unusual.

Q Again, without reviewing each of these, let me ask you this: With regard to the transactions involving 170 bonds, which was the number which were sold on that date, whatever that date was, do you regard it as unusual, usual, or very unusual, to find as many instances as you yourself have indicated herewhere the purported quotations given by phone varies to such an extent upward from the sheets?

A Very unusual.

Q Turning back to Allegheny Beverage, do you regard it -- I don't know if I asked this question -- do you regard it as very unusual -- withdrawn.

In the practice of your firm, is it usual to indicate on the back of an order ticket the quotations that you receive from the various houses that you call in order to make the market, to establish a price?

A No.

Q Have you ever seen that done?

A I have never seen that done, no.

Q In anyplace you have worked, you have not seen that done?

A No.

THE COURT: What is it he hasn't seen done?

MR. BLUM: Quotations written on the back of an order ticket, your Honor.

THE COURT: You mean the practice of recording the quotations from other companies on the back of your own order ticket where you have used it as the basis for setting a market price?

MR. BLUM: That is correct. And the witness has testified he has never seen that done.

Q Is it usual in your experience in going about pricing debentures in order to sell them, to time stamp the order ticket at the time at which each quotation is received?

A No.

Q Have you ever encountered that being done?

A Absolutely not.

MR. BLUM: Your Honor, I have no further questions of this witness.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. GOLDSTEIN:

Q In response to a lot of Mr. Blum's questions regarding some of these debentures, you said "unusual," "slightly unusual," "very unusual." Even assuming it is very unusual, it does happen, does it not?

A It does happen.

Q On occasion?

A It does happen.

Q And it is very possible it happened in this case, is it not?

A Cases.

Q Cases. It is possible?

A It is possible.

Q OK.

Now --

THE COURT: When you say it is possible, do you mean it is possible as to any individual one or that you could have so many cumulatively?

THE WITNESS: That is impossible.

Q Well, it may be statistically impossible, but if it is possible for each one on different dates, isn't it possible that they all got together on one day it happened, however much the odds are against it?

A Statistically, I gutes it could possibly happen.

Q OK.

Now, you are a member of the NASD, is that correct?

A Yes.

Q Let me read to you paragraph 2156 under the section "Policy of the Board of Governors."

"Members and persons associated with members in the over-the-counter market may make trading decisions and set prices for customers upon the basis of telephone and wire quotations as well as quotations in the National Quotation Bureau sheets."

Do you agree with that statement?

A Yes, I do.

Q So it is a combination of all three?

A Yes.

Q "In some instances, the dealer's quotations, purportedly firm, are in fact so qualified upon further inquiry as to constitute 'backing away' by the quoting dealer."

Do you agree with that statement?

A Yes, I do.

Q "Further, dealers who place quotations in the sheets have been found to be unwilling to make firm bids or offers upon inquiry in such a way as to pose a question as to the validity of the quotations originally inserted."

Do you agree with that statement?

A Yes, I do.

Q So it happens some firms do not follow what is in the yellow sheets, is that correct?

A Yes.

Q Now, a firm puts a price in the yellow sheets the day before that it appears?

A Twenty-four hours, yes.

Q In your opinion, is that firm bound to follow what is in the yellow sheets?

A Absolutely not.

Q If Mr. Lamula, without any markup, commission or anything else, had charged Mrs. Grupe 3 points, instead of, say, 51 he had charged her 54 for one of these debentures, when 54 was quoted in the sheet, the highest price, he charges her 54 --

A OK.

Q -- would that be unusual, very unusual?

A If he charged her 54 --

Q When the highest was 51.

A In the sheets?

Q Yes.

A That wouldn't be very unusual, no, because the price -- because as we just determined, the price in the sheets are twenty-four hours late. Therefore, it isn't necessarily correct. So 54, I mean the bond can fluctuate 2 points. That's possible.

Q Could it fluctuate more than 2 points?

A In twenty-four hours?

Q Yes.

A On very unusual circumstances, it certainly could.

Q You stated in reference to Lincoln Mortgage, with reference to Wagenseller & Durst, that they showed one figure continuously?

A That's correct.

Q Is that unusual for a marketmaker to show one price for four or five days?

A It is not unusual, but from time to time someone will forget that they are putting in a card at a certain price and so it could go for a period of time until someone would call up and say, "Listen, the market isn't 40-50," but it is something else, and they say, "Oops, I forgot to change my card."

Q Even though those quotes appear continuously, 40-50, 40-50, 40-50, isn't it possible they bought or sold some bonds in that period at prices other than that indicated, the 40-50?

A That's an indicated market. It is not indicating what they might pay. I am not sure I understand your question.

Q In other words, they may pay more or less?

A They may pay more than 40 or they may sell bonds for less than 50. 40-50 is a very, very wide market.

Q Even though they are continuously quoting those prices, they may actually be selling and buying at different prices?

A Yes. In fact, I would hope that they would be.

Q You handled the sale of Mrs. Grupe's debentures?

A With the exception of one.

Q Which one?

A I think it was the Monroes.

Q How did you go about selling them?

A I called all of the people that were making markets in the sheets and asked them what their markets were.

Q When you called up, say, Murphy & Durieu and they gave you a price, did you mark it down someplace?

A As is my custom, I marked it -- I was using the sheets and I would mark it on the sheets next to Murphy & Durieu what its market was, so if there were four people

I would remember whose market was what.

Q Did you make out an order ticket for each one of the ones you handled?

A I took an order from Bob Loeb to sell these bonds, and I wrote down probably all of the bonds rather than one. For each one I would write the whole thing, the whole list.

Q On one sheet of paper?

A On one sheet of paper.

Q And then what would you do with that sheet of paper? Say with Allegheny you have called all the marketmakers and gotten their quotes.

A That's right.

Q Now what would you do?

A Whoever the person was who had the highest bid I would sell the bonds to that person and I would time stamp the sales slip.

Q So you did time stamp something?

A Whenever there is a transaction between two different firms, I would time stamp my sales slip.

Q What did you do with the yellow sheet on which you had written all the quotes you had gotten from the marketmakers?

A It is kept within the firm for -- within our arbitrage department for a period of days, and as the new ones come in, the old ones were thrown out.

Q So you don't have those any more?

A No, I don't.

Q Aren't you required by the NASD to keep them?

A The yellow sheets, no.

Q No, the sheets on which you mark down the prices you receive.

A No.

Q On Technical Operations, you sold twenty bonds at 61 apiece, yet the bids on that day were from Kaufman at 64 and Financial at 65, John Lamula none. You did not get the highest bid for those bonds, did you?

A According to the sheets, I didn't get the highest bid.

Q Right. And that could be said of any of them where there is a discrepancy?

A That's correct.

Q Did you get the highest bid that was quoted over the phone to you?

A Absolutely.

MR. GOLDSTEIN: No further questions, your Honor.

MR. BLUM: I have a few, your Honor.

REDIRECT EXAMINATION

BY MR. BLUM:

Q Mr. Angelo, you referred to a very wide spread. Does that have some significance in the process of trading these debentures in your experience?

A Yes. It means that they are probably most illiquid, that they would be of very low quality when a bond was quoted 40-50.

Q How does that contrast, for example, from the spread, as you call it, in the quotation of a AAA bond?

A A AAA bond, the difference between the bid and the asked might be a quarter of a point or less, or a half, but never more -- certainly not more than a point.

Q The quantity of debentures involves ranged from 5,000 face value -- that is five debentures -- to 30,000 Allegheny Beverage -- that's thirty debentures. In your experience, did that represent a large -- does a thirty-debenture sale represent a large transaction?

A No, it is quite small.

Q How are sales of that size denominated in the street?

A There are odd lots and round lots. Round lots are a hundred bonds or more.

Q That means -- if I understand that correctly, that means that bonds normally, and debentures, normally trade in packages of a hundred thousand dollars face value. Is that correct?

A No. Let me --

Q What is the significance of the difference an odd lot and a round lot, if any?

A I am not --

MR. GOLDSTEIN: Your Honor, this wasn't covered on cross.

THE COURT: No, it wasn't.

Q However, there was some discussion with regard to fluctuation in prices and perhaps I can connect with that, your Honor. Is a fluctuation in price of the kind indicated by the -- withdrawn.

Do you have 166?

I show you Plaintiff's 166, already in evidence, which is sheets which show with regard to each of these debentures the prices at which L. F. Rothschild sold them as compared to the prices which were quited in the sheets in the course of that day.

Now, let's look at the first one, Allegheny Beverage. The low bid shown in the sheets for that day which came out of correspondence received in your office the following day was 330. Is there anything, in your experience, which is unusual in the marketing of thirty Allegheny Beverage bonds in terms of the fact that it was at a 330 price against this showing in the sheets?

MR. GOLDSTEIN: Your Honor, again I would object. I don't remember this being covered on cross.

MR. BLUM: I do indeed.

THE COURT: My problem isn't so much whether it is proper redirect, but I find the question a bit jumbled. Will you restate it?

MR. BLUM: Yes, sir. Let me see if I can.

Q The first sheet of Exhibit 165 shows certain prices, and it shows that L. F. Rothschild sold at 30,30, that is the price of 33. Based on your experience, is that an unusual variation between the sales price during the course of that day and the sheet prices shown?

A No.

Q Nos, DWG, there were no quotations for a period of many months, so I think we can pass that one over.

With regard to Applied Data Research, the only bid in the sheet was from John Lamula Investors at 500 and you sold them at 550. Is it unusual to be half a point -- excuse me, 5 points higher, 5 points above the bid, but well below the asked?

MR. GOLDSTEIN: I would object to this whole line. I think the witness testified the yellow sheets don't mean anything, that they can be changed.

MR. BLUM: No, he did not. He said he was guided by those in response to your question, I believe. He said he was guided by those as well as by telephone conversations and his own knowledge of the market indications. But to clarify your testimony to the jury, perhaps I can ask that question.

Q Do the market sheets, in your judgment, provide any basis for guidance in determining the pricing of junk bonds?

A Yes. They are an indicator and a good indicator, but they are certainly not the last word.

Q So you are obliged, are you not, as a matter of law, to get telephone quotes beforehand?

A Absolutely.

Q And when you look at the yellow sheets, you look at the prices in the yellow sheets as well as the names, do you not?

A I would look at the prices; I would not pay a great deal of attention unless the markets I was getting were greatly different. Then I might ask what's going on. Why the great dissimilarity?

Q And in your experience, was what was shown on

Plaintiff's 165, which was the batch of sales by Mr. Lamula to Mrs. Grupe, was that greatly unusual?

A Yes, it was greatly unusual.

MR. BLUM: I have no further questions, your Honor.

MR. GOLDSTEIN: No questions, your Honor.

THE COURT: Let me ask you one question.

With respect to the variations of quoted prices on the phone with the prices put in the yellow sheets by marketmakers, absent some dramatic development with the company -- and I believe the testimony is that there was only one of these companies that had anything of any importance which did lead to a fairly substantial shift -- absent something of that nature, how much of a variation from the quoted price would you call to be unusual? In other words, a point or 2 I take it is usual.

THE WITNESS: A point is usual from one day to the next, maybe 2 points. Maybe. But 5 points would be unusual.

THE COURT: Is 10 very unusual?

THE WITNESS: 10 it would be dramatic, either the stock was going up quickly or there was a corporate development that would cause that.

THE COURT: Assuming for a moment a company is in the sheet four consecutive days with the same prices, maybe only slight variations, enough to show they are live prices, and in the middle of that period they are said to have quoted a price 5 or 10 points different from what they have been actively listing it. Would that be very unusual?

THE WITNESS: Very unusual. Because it would mean that it came down the next day.

THE COURT: You would expect a dramatic change to be reflected in the next day's quote?

THE WITNESS: Sure.

THE COURT: Is it proper to simply put in low prices in the yellow sheets to attract business and then immediately raise the prices when called?

THE WITNESS: It is a practice that is used from time to time, but the price would be of one of these people, a Wechsler, Carl Marks, to be 1 point higher on the bid, reflecting they might be short and they were trying to buy the bonds back, or they might offer the bonds a point lower than their competition because they own bonds and they were trying to sell them.

THE COURT: But do they ever go way off what they intend to ask, 5 or 10 points, just to attract business, knowing that the business will come into them on a bid and asked basis so they can't tell which they are doing?

THE WITNESS: I would hope not.

THE COURT: All right. You are excused.

MR. GOLDSTEIN: Your Honor, I have one other question that I forgot to ask.

RECROSS-EXAMINATION

BY MR. GOLDSTEIN:

Q With reference to Exhibit 45, the confirmations, do you have those?

MR. BLUM: They are in front of the witness.

Q I think it is the second box,there is a number on each of these confirmations. What does that number signify?

A It is the interest and the sales tax.

Q In this case, could you tell us whether it is the interest or sales tax,given the sum?

A No, I couldn't.

Q In other words --

A I mean I could tell it was a combination of the two.

Q Taking the amount this was sold for, twenty-six forty as a commission, $40, correct?

A Yes.

Q So the commission you subtract from the amount?

A That's right.

Q And that would be 2,600?

A Correct.

Q If this was a tax, wouldn't that be deducted from the 2,600?

A Yes, it would.

Q In this case, it is added because it is 26, 16, 67?

A That's correct.

Q Doesn't it indicate --

A It indicates it is interest.

Q All of it?

A All of it.

MR. GOLDSTEIN: No further questions.

THE COURT: You are excused.

(Witness excused)

THE COURT: Are there any further rebuttal witnesses?

MR. BLUM: No, your Honor.

THE COURT: Do you rest?

MR. BLUM: I rest, and renew the applications which I made previously.

THE COURT: The same rulings.

MR. GOLDSTEIN: Your Honor, at this time I have

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additional papers I want to submit, and I think maybe we should do it without the hearing of the jury.

THE COURT: All right. Are these going to be exhibits you are submitting?

MR. GOLDSTEIN: No, to the Court.

THE COURT: You in effect are resting also?

MR. GOLDSTEIN: Yes, your Honor.

THE COURT: After our recess, you will be prepared to commence your summations?

MR. GOLDSTEIN: Yes, your Honor.

THE COURT: All right. We will excuse the jury for fifteen minutes.

Do not discuss the case.

(Jury excused)

THE COURT: Do your additional papers concern the interrogatories to the jury?

MR. GOLDSTEIN: No, it concerns an additional charge and it is a supplemental memorandum, your Honor, which for reasons which will become obvious right away couldn't have been submitted before.

THE COURT: Before we get to that, though, I want to tell you that I am not too happy with the interrogatories and I want some changes made in them and I wish you would note down what the changes are right now.

MR. BLUM: Your comment is exceedingly fortuitous. Would you mind if the lady in the mellon-colored dress approached? She happens to be my secretary and I can't think of anybody who is more interested in what your Honor is going to say.

THE COURT: I am not going to tell you how to reword them, but I will tell you how to merge them and reshuffle them.

Starting with number 6 through 11, these all concern misrepresentations -- excuse me, not misrepresentations, omissions.

I would like them blended together in a single question which starts out along these lines, and this time I will give you the language:

"In the course of recommending the debentures to the plaintiff, did Mr. Lamula not" -- underscore "not" -- "inform her of the following matters:" and then sub A will be 6 and sub B will be 7, extracting only the last part of each question, and 8 will be -- excuse me, C will be 8, and so on, until you have run yourself through 11.

MR. BLUM: Through the A subdivisions, in short?

THE COURT: Yes.

And then after that, I guess we will put a separate question with a new major number, and it will read -- this will be number 7: "If you have answered any of the parts of question 6 'yes,' do you find that Mr. Lamula omitted such information with intent to deceive Mrs. Grupe?"

And then 7-B will be: "If you have answered the above 'yes,' which questions of number 6 do you find were so answered?"

MR. GOLDSTEIN: Would that first one, 7, have a yes or no next to each number?

THE COURT: You could try doing it that way.

MR. BLUM: Why don't we do that?

THE COURT: I want to blend it together. I don't want the omissions separate. I want them all in one question.

Then that changes 11 so that 11 refers to -- instead of referring 2 through 10, it will be 2 through 7.

Excuse me, it will be 2 through 6. 11 now becomes 2 through 6.

OK?

MR. BLUM: All right. That is no problem. It is on a memory typewriter so we will be able to have it for you tomorrow morning first thing.

THE COURT: With respect to numbers 12 and 15, they should be together, and I don't think there is any need --

I don't think it is a well-worded question in either event the way it starts out.

MR. BLUM: Which one, your Honor?

THE COURT: 12 and 15. I think if you leave out the business about "Mrs. Grupe's knowledge was small by comparison," etc., and the questions 12 to 15 should read approximately, "Did Mrs. Grupe, or was Mrs. Grupe entirely dependent on Mr. Lamula for: A, guidance in selecting her investments; and, B, determine the price at which she bought the debentures?"

That puts 12 and 15 together, and puts them together without a lot of verbiage.

MR. BLUM: I think you dropped the word "almost entirely dependent" and I do believe the cases support the proposition that a breach of fiduciary duty, which is what this is addressed to, does not require "entirely."

THE COURT: If I left it out, it is in error and it should be "almost entirely."

I don't like 13. I think it leaves the jury too much in the open.

MR. BLUM: This was the one we worked on in the robing room yesterday.

THE COURT: If so, it didn't come out right.

Let me suggest the first paragraph of 13 is all right. 13-A should be the same as it is, only instead of ending with the question mark, it should go on "considering the prices existing in the market at the time."

Then 13-B should be, "Did Mr. Lamula make the purchases of securities on May 21, 1974, for the specific purpose of selling them to Mrs. Grupe, who he knew was prepared to purchase them?"

That's the general idea. Maybe you can change the language a bit. I think there has to be a finding on that. It isn't enough for them to just generally say he overpriced it. They either have to find that he didn't take them into inventory or that he overpriced on what the existing market was, one or the other, or both. Then what is now 13-B will become 13-C.

MR. BLUM: Your Honor, there is one aspect of that -- I agree with -- I certainly approve of the question that you dictated. There is one aspect of it, however, which I hope won't be overlooked, and that is, it is our contention that acquisitions which were made before May 29. Although they might not be direct to the relevant pricing, they are relevant to whether or not he was buying them for sale to her.

There was a concession there were no transactions between acquisition dates in May and in April.

THE COURT: As to the approximately 50 that he held in inventory for more than a week, I will allow you to submit to the jury the possibility that these were riskless sales. The only thing you can submit to the jury there is did he charge her a fair price on what was then the market. That's why I separated the two. They are two separate issues.

MR. BLUM: I take it there is, however, your Honor, from the point of view of determining Mr. Lamula's intent in the entire course of dealings between the two -- there is nothing improper in my referring to the fact that he was virtually without inventory in these.

THE COURT: You can argue it to the jury, but I am not going to submit it as an issue.

MR. BLUM: That is the point I wanted to make.

THE COURT: With respect to 16, 17 and 18, it seems to me 18 should refer to 16 as well as 17.

MR. BLUM: Sure. 16 or 17.

THE COURT: Don't bother renumbering. You can keep anything you have got. Don't worry about how these appear if it becomes a problem.

Let me also suggest to you that number 10 you have got a double negative and it reads very poorly. That's becoming a sub-question under 6, and I would suggest that you just pick it up at the phrase "this is what he was alleged to have told her, that she could not expect to acquire 12,000 yearly from her investments unless she bought speculative securities involving risk."

I am not sure that is at issue.

MR. BLUM: I think Mr. Rowney made a point the broker should advise the customer if the aim can't be accomplished without great risk.

MR. GOLDSTEIN: That's assuming she couldn't get the 12,000 unless she bought speculative issues, which is a wrong assumption.

THE COURT: It includes that assumption. That troubles me slightly. Let's see if I can word it better.

MR. BLUM: Maybe "did not advise her" --

THE COURT: I think he admits he didn't tell her there were any great risks involved. He takes the position that the risks were not great. Am I correct that's your position?

MR. BLUM: Yes. Maybe we can state it the other way around. "Do you find Mr. Lamula advised Mrs. Grupe that the risks" --

THE COURT: I will tell you what. Leave out

10 as part of the preceding question. Instead 10 will read as follows: -- incidentally, you have "intending to deceive" in both halves of 10. I don't understand that.

MR. BLUM: That was a typographical error.

THE COURT: All of 10 comes out and the new 10 reads as follows:

"Did Mr. Lamula fail to advise Mrs. Grupe of risks involved" -- make it "of the risks involved in purchasing these securities?"

MR. GOLDSTEIN: Your Honor, if I be permitted, perhaps "of any risks" instead of "the risks."

MR. BLUM: I like it the way the Court did it.

MR. GOLDSTEIN: That I can understand, but I think "any" would be fairer.

THE COURT: All right, we will change it, "Did Mr. Lamula fail to advise Mrs. Grupe of the extent of the risks involved in purchasing the securities?"

MR. BLUM: I like that better.

THE COURT: Then you can keep 10-B as it is. Keep 10-B and change 10-A.

MR. BLUM: And then feed that into the regular set of questions, or do you want it as a separate number?

THE COURT: Yes.

MR. GOLDSTEIN: There is one other point which

I think in view of the Ernst & Ernst decision is concerned. As far as any omissions, I think the jury should be required to find if there were any omissions do they find that if those omissions had -- well, if there had not been those omissions, would that have changed the plaintiff's desire to purchase the debentures.

In other words, if they found, say, that he told her "I am taking it out of inventory," would that have made any difference to Mrs. Grupe's wanting to purchase the debentures?

THE COURT: You have lost me.

MR. GOLDSTEIN: I think those cases hold that there must be a finding that the facts which were omitted must be material in that they would have affected the purchase or sale of the debentures.

THE COURT: I now follow your point. After you have listed 6-A, -B and -C, and before you go to -- how did we handle 6-B, did we make that 7? We did, didn't we?

MR. BLUM: Yes.

THE COURT: What have we got as 8 presently? Do we have a number 8?

MR. BLUM: 8 will become 6-C.

THE COURT: Do we have one that remains as 8?

MR. BLUM: They will all advance in number.

THE COURT: Forget that advancing. That changes numbers. We don't have an 8.

What is 7 at the present time?

MR. BLUM: "If you have answered any of the parts of question 6 'yes,' do you find that Mr. Lamula omitted such information as intended to deceive Mrs. Grupe?"

THE COURT: Make 8 the following:

"If you have answered any of the questions under 6" -- no, "If you have answered any part of question 6 'yes,' do you find that if Mr. Lamula had informed Mrs. Grupe of these matters, she would not have purchased these securities?"

That's a double negative.

MR. BLUM: Not only that, but I don't think it is legally correct, because these are omissions.

THE COURT: Yes.

MR. BLUM: The question is --

THE COURT: If she had known the facts, would it have affected her decision. In effect, it is asking was it a material omission.

MR. BLUM: Again, for each one of those points I think I cited authority which is keyed in the requests to charge in the trial memorandum to cases which hold that

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as a matter of law --

THE COURT: There are omissions in some circumstances which by law are material.

MR. BLUM: And each of those I listed there is supported by case authority which says that they are material. That is why I did not include the word "material."

THE COURT: You mean rating services are considered per se material?

MR. BLUM: I think the cases are quite clear failure to advise a customer in dealing in this kind of security of their ratings is material per se.

THE COURT: I don't think that would apply here because he said he told her he didn't know what the ratings were, he didn't trust them, and he had his own ratings. That's a different ball game.

MR. BLUM: It still doesn't alter the question if he didn't advise her what the ratings were. He failed to provide her -- it is one thing to say, "The ratings are A, B, C, D, E, F and G, but, dear client, disregard these because they are" --

THE COURT: There is no question he did not tell her what the Standard & Poor's and Moody's ratings were. That is undoubted. You are saying per se you have won the case.

MR. BLUM: Yes.

THE COURT: I think you are wrong.

MR. BLUM: I think that is a material misrepresentation right there, and the question is -- there is a double question or a double standard and she gets the benefit of either one if in fact she relied on it or if a reasonable person would have relied on it, then that's the ball game. That was the basis for my application, your Honor. I think that the only thing left open is whether he did that intending to deceive her.

THE COURT: No, I don't agree with you there because if that was all that was involved, he has admitted a securities fraud.

MR. BLUM: No.

THE COURT: You don't need intent to deceive on a securities fraud.

MR. BLUM: Yes.

THE COURT: But not on a suitability.

MR. BLUM: Yes, that's correct. That was the basis for my motion. I think he has admitted liability in a whole series of these.

THE COURT: I am not agreeing with you.

MR. BLUM: If I can show intent, then I've got the link closed. That's the only thing that remains.

THE COURT: Read me back number 8, please.

MR. BLUM: "If you have answered any part of question 6 'yes,' do you find that if Mr. Lamula had informed Mrs. Grupe of these matters, she would not have purchased these securities?"

THE COURT: That's the best I can do without seeing it in writing. But I have no pride of authorship. It may be it can be changed to make it read better.

I have a whole bunch of supplemental charges. I will read them during our recess and we will talk about them later.

(Recess)

(In open court; jury present)

THE COURT: All right, Mr. Goldstein.

MR. GOLDSTEIN: Your Honor, Mr. Foreman, ladies and gentlemen of the jury:

As is traditional in these kinds of cases, since the plaintiff has the burden of proof, I have to open first -- close first. That means, in essense, that once I sit down that is it. Mr. Blum will then get up, he will make a closing statement. Anything he says, I cannot rebut. Therefore, I have to anticipate what Mr. Blum will say, and I hope I do so. However, if by chance I should miss something, I don't want you to think that I purposely omitted saying it or that therefore you should take plaintiff's position on that particular fact, but merely look upon it as in the short time possible, I have to cover what is important in my mind and hope that I cover everything.

Now, to begin with, let's look at the individuals in this case. First, you have my client, Mr. John Lamula, a man who has been in the political arena for some forty years, worked with Mayor LaGuardia as a troubleshooter, was in the assembly, was instrumental in proposing certain legislation, including protection of our streets through his idea about how the uniformed men go back and forth to work, and his proposal about stock thefts and how to prevent them.

You have a man who, Miss Emerson testified, has a reputation for honesty up in Albany, and Miss Emerson has known this man for approximately thirty years, and she was unequivocal in her praise of him.

He has been in the securities business, and he has testified that not once since he has been in the securities business neither he nor his firm has ever been reprimanded by either the NASD or the SEC. Never. Yet he is in this court today.

Now, let's look at Mrs. Grupe. Educated woman.

Two degrees. A master's degree in education. And she testified she specialized in reading. She worked at one time for IBM at a per diem rate of approximately $200 at one point. She worked for the state on a per diem basis. She is an intelligent woman. No question about it.

She has had two marriages. The first marriage she married a Mr. Clark, lived with him approximately thirty-some-odd years, had three children.

She testified she knew at the beginning of their marriage he was making $1,200 a year -- excuse me -- subsequently she lost track of what he was making. Apparently, he didn't confide in her.

She testified also as far as the college education of her children, she had to put all her sons through college, she had to pay for it. Never inquired of Mr. Clark apparently of whether he could afford it or what, but she paid for it; she had to get part-time jobs.

A few weeks after she divorced Mr. Clark, she married Mr. Grupe, and she testified one of the things she had asked Mr. Grupe before marrying him was, "Can you put my sons through college, can you help," and he said, "Sure, no problem."

Now, she testified that she had made several purchases, a couple of purchases, during her life before she met Mr. Lamula. The first purchase sometime in 1950 she had some extra money, a small amount. She had been saving all this time to help her children through college, through school, etc. A small amount of money. What did she do with it? She invested it in some land in Port Charlotte, Florida. She didn't buy U.S. Savings Bonds, didn't put it in the bank like perhaps you or I would do, bought some land down in Florida.

She testified also she knew until she had paid the full installment price that land didn't even belong to her, she didn't have ownership. It is not like in New York where you buy the house, it is yours, and the bank has a mortgage.

She marries Mr. Grupe and has assets of approximately a thousand dollars. She testified during the first year she spent about $500 on that and various household items; apparently Mr. Grupe was rather stingy when it came to money. $500 left.

What does she do with this, her only money in the world? She tells her friendly neighborhood broker, "Here's $500, I want to put it in some stock. Pick it out, I'll take a fling."

Lights are out as far as we are concerned. That's what she did with the $500.

Now she divorces Mr. Grupe, gets approximately $138,000. What does she do with that? Well, a hundred thousand she first puts in a certificate of deposit, I believe, some other bank, not in Albany, and her son then takes her down to L. F. Rothschild, the same L. F. Rothschild she later invested with, and wants her to discuss possible investments with somebody.

What did she say she knew about L. F. Rothschild? Well, it was a brokerage house. I asked her what did "brokerage house" mean to you at that time. Well, they invested in stocks. I said, "But you didn't want stocks, did you?" No, her family had had severe problems because of stocks in the Great Depressions. "Why did you go to L. F. Rothschild?" "Well, my son took me." So she went down. listened to the man, and sure enough, he advised her to buy stocks, and she said the equivalent of "Thank you very much," and walked out very politely, never spoke to her son about it any more, never spoke to the man at L. F. Rothschild, and that was it.

Then takes a hundred thousand, puts it in the certificate of deposit up in Albany.

The other 38,000, 11,000 of it was given to her son. Whether it was a gift or a loan is in dispute. If you remember Mr. Lamula's testimony, he said yes, she

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said she gave $11,000 to her son. Mr. Lamula said, "Wasn't that unfair to your other sons?" She said, "That's all right, it was a loan, I got a note back."

The rest of the $38,000 spent on living expenses, understandable, to buy a car, different things.

She now comes to Albany and meets Miss Emerson and tells Miss Emerson she has a sum of money to invest and she wants somebody to invest it for her.

Here we come into a discrepancy, the certificate of deposit. Mr. Lamula said, "Well, about the second meeting she told me the man at the bank, Mr. Leyden, said when the certificate of deposit comes due in July, it will go from 8 to 7 percent." "I need more money, I want to take it out and invest it."

Mrs. Grupe doesn't remember saying that.

Now, at the beginning of this case I said logic is going to carry a lot of weight in this case, as to the gravamen of this case.

Let's look at this carefully. Here Mrs. Grupe had a hundred thousand dollars in a certificate of deposit. Why did she want somebody to invest it if it was doing very well there? If she had no fears about it? She would renew it. Does it make sense, unless she knew the bank man had said it is going to go down a point, you are only going to get 7 percent. Apparently that wasn't enough.

Now, sometime im March, Mrs. Lamula met Mrs. Grupe. They had a couple of meetings. If you will remember, Mrs. Grupe said, "We had about three or four meetings," and I reminded her what she said in this deposition, September 8, 1975, over one year ago, when her mind was fresher, what did she say, two meetings? "Two meetings, that's all I had with Mr. Lamula," before she invested. Suddenly, she comes up with three or four. Why? Would it be logical two meetings and then you give a man $100,000 and say, "Go ahead and invest," a man you knew only four hours?

There would be a time problem. If they met in March and had two meetings, that would take them maybe to the month of April. What happened to the month in between?

Mr. Blum argues May 21, 22, 23, when were they purchased? They were definitely purchased one of those days, not in April. Mrs. Grupe apparently realized if she comes in and tells you ladies and gentlemen there are only two meetings, she has a whole month to explain. What was she doing that whole month? So she had to get two more meetings and between September of 1975 and today she did it.

What was Mr. Lamula's testimony, seven, eight or nine, he wasn't sure. Miss Emerson the same. That's more logical.

If Mr. Lamula from the very beginning was out to take Mrs. Grupe's money, was out to fleece her, to rip her off, to use the parlance, why waste all this time? You saw Mr. Lamula. He's been around. He's been in the business. He didn't have to go through this. If Mrs. Grupe was as naive as she tries to make out, the first meeting he could have said, "How much money do you have? I have great buys for you. Here it is." The next day gone out and bought it, good-bye and good luch, and that's the end of it.

No, he spent almost two months setting up this pigeon. Does that sound logical when he could have done this any time in there, but he spent two months night after night after night going over it. And Mrs. Grupe said, "Yes, he lectured me."

If somebody was going to take her, why lecture? Isn't it a possibility that the person you are going to speak to will remember something, will catch you in a discrepancy, will understand what you are saying and will say, "Hold on, wait a minute, that's not for me," will ask questions?

Mrs. Grupe is a teacher, and I asked her if a child doesn't ask a question after you have said something, don't you assume that child knows what you are talking about? She didn't have an answer for that. She testified, yes, she told Mr. Lamula I don't know economics and I rely on you. Fine. Mr. Lamula didn't take that for an answer. He went then and told her about each company. Do you understand it? And she sat there. Perhaps she smiled at him. Who knows. She didn't say, "Wait a minute, raise your hand, I don't understand what the word 'debenture' means."

And she testified Mr. Lamula explained what a debenture was. She said she didn't understand it, but did she question him? No, nothing. Couldn't Mr. Lamula have assumed she is not saying she doesn't understand, so I guess she does, and I will move on to the next point?

Now, we come to the question of what day were the debentures purchased on. You heard Mrs. Vena's testimony. The 23rd. All the testimony equals the 23rd. Suddenly, out of right field, comes, well, maybe it was the 22nd, maybe it was the 21st. Sure, maybe it was March 31.

The only evidence in here as far as we are concerned is the 23rd, and I don't see why we keep on harping on any other day. The 23rd is the date.

Now, we come to the second Tech Op purchase. That was, as this chart will indicate, on June 3.

Now, what did Mrs. Grupe state? She said, "Well, I made the first purchase, confirmations were not sent to Albany, which Minnie Vena said, no, they were not sent to my home near Buffalo."

"When did you get back to Buffalo?"

"Oh, about the middle of June."

The middle of June would be sometime in here.

"And what did you do when you got those?"

"Well, I looked at them briefly, stuck them in a drawer, and that's it."

The second Tech Op was bought on the 3rd and Mrs. Grupe had to give a check by the 10th, which she did. But she was screaming mad, how dare you buy something I didn't want. That was 5,000 shares and cost $4,000. That she looked at and that she raised with Mrs. Vena on the phone, supposedly. The other $99,000 that she got she puts in a drawer and doesn't look at, yet this one she probably got before she got the other ones, if we believe her, and this one caught her attention and this one she was mad at. The other ones she didn't question and those were several slips for $99,000.

She said, "I called up Mrs. Vena." She called her on this and called her on Elco and said, "What's John doing? He bought it without my permission," etc. The question was asked, "Did you ever tell John Lamula that?"

"No."

You saw the letters, you heard the letters. Do any of those letters berate John? Do they say, "John, what are you doing to me? Why did you buy it?" No, they are all "honey," "dear," "golly, honey." That's the kind of language. She admits they never talked to John Lamula. She never said, "Did Minnie Vena tell you I was unhappy, why did you buy it?" No, lovey, dovey.

Now, with Elco, that was purchased July 10. The money had to come in the 17th. Mrs. Grupe testified she wasn't sure when she got the confirmation, but it was definitely by July 15, the date in red.

How does she know? Because on that day she called up Minnie Vena screaming, "What's John doing? I didn't want this. I didn't order it. Why did he buy it for me?"

And what did she testify? She did not send in that check for the rest of the week until she spoke to him on the 19th. The 19th. She is sure of it. What does that check show? You can take it in the jury room. The 17th it was deposited in Mr. Lamula's account in New York. The date is on the back. It is undisputed. The check is written the 16th.

Now, that is clearly, clearly a fantastic story.

She kept it until the 19th, yet it was deposited in the bank on the 17th. It is right there. There is no dispute about it. Yes that's her story.

Fine.

Now, let's talk about the companies. You have heard Mr. Rowney, you have heard Mr. Lamula. Mr. Rowney conceded that, yes, it is important for the trader to know the companies, it is something to consider.

Mr. Lamula knew these companies inside and out. You saw him testify. Mr. Blum couldn't find something after spending the night looking for it in the book about dividends. He found it in two seconds. He knew where it was. I am not faulting Mr. Blum, but Mr. Lamula knows where it is. He has lived with these companies.

What does he do? He goes all over the country where the companies have their headquarters. He speaks to the president, the treasurer, he gets the filings with the SEC. He gets their prospectuses, he gets everything he can. He learns these companies and then recommends it to a client.

What did Mr. Rowney do? "I went to my library and whatever was there I looked it up and that's how I made my decision."

Fine. If that's the way he can make a decision, fine.

You have heard the term "junk bond." If you will remember, that came out before Mr. Rowney was confronted with the fact that his own company dealt in junk bonds. That term, "junk bonds," you know, I really find it fantastic. You had a man today from L. F. Rothschild. He is their chief dealer in junk bonds. Mr. Rowney said, "Yes, we have a department in junk bonds." If these are junk bonds, these are major brokerage firms. They deal in junk? That's what they are telling you. It is positively fantastic. A partner in L. F. Rothschild does nothing but sell junk all day. That's what he is telling you, in effect.

Now, unfortunately, once they used the term "junk bonds," they were stuck with it. They had to carry it all the way through. It sounds ridiculous.

Did Mr. Rowney say, "We don't sell junk bonds to our clients"? "Well, who do you sell it to? Do you try to stick somebody else with it? Who do you sell it to?"

Then he said, "Well, some institutions."

Like maybe Chase Manhattan Bank is going to sell a junk bond, if that's what it is, or Metropolitan Life Insurance Company is going to say, "Give me thirty junk bonds." If that is so, are they required to tell Mr. customers when they come in, "I want to tell you, so you are advised, that you are buying junk"?

That's what they are telling you.

I can see if we are talking about companies that have been in business a couple of years, bearly getting by. Each one of these companies had sales registered in the millions of dollars. DWG had a hundred million dollars in sales. These are not junk companies. They have been around. One of them went into Chapter 11 and then came out of it. Chapter 11 isn't bankruptcy. They reorganized and came out of it, still in business. All these companies are still in business.

What did Mr. Lamula testify? Why do you have diversity? Because of the fear that maybe one, two of these companies something bad will happen. You don't put all your eggs in one basket. Nobody can say, yes, these companies are going to go good. If anybody could do that, he would only have to buy one company and say, here it is.

He put her in ten or eleven different companies, whatever it was. One of them happened to go bad. The others were good. She got her interest on time, she got the exact income she wanted, she was getting checks almost every month. She had exactly what she wanted.

She sold them at a loss. OK. You have heard the testimony. July and August of 1974 were terrible months. Nobody knew where the country was going. Mr. Nixon looked like he was going to face an impeachment trial. The stock market was probably at its lowest since the Great Depression. Conditions were terrible. If you had gone in and sold General Motors stock that you had purchased a few weeks before, you probably would have taken a loss.

So she took losses. Of course she took losses. Does that mean these securities were not worth anything? No. She sold them purposely at the wrong time. That's what happened.

You have heard her testimony about the yellow sheets. I think the rebuttal witness today put to rest once and for all, exactly what those yellow sheets are. They are not the Bible, they are not holy script, and as Mr. Angelo testified, no broker is bound by what is in those sheets. He could put 40 and 50 and sell them for 50 and 60. Mr. Angelo said, yes, some differentiation is unusual, very unusual, not unusual, but it happens. It happens.

You have seen L. F. Rothschild. You have seen their figures. A couple of cases they sold below what was on the yellow sheets. I believe Mr. Angelo. Of course it was below. Because those were not the prices we were quoted. You heard the NASD manual which Mr. Angelo agreed with. Yes, sometimes brokers put in prices and they don't stick to them.

Now, Mr. Lamula explained why there were price fluctuations in some of these. Elco had rumors of purchase. Nortek was going to purchase its own bonds. In fact, that came out the morning of the 22nd, 1014 in the morning. Do you think a broker who is going to sell at 10:15 is going to say, "Well, I put in a price twenty-four hours ago and that's what I am going to stick by," when this news comes out?

Now, you look at Mr. Lamula, you saw the way he testified. Is this a man who is going after all this time -- he is now sixty-four, at the end of his life, in the fall of his life -- he is going to go out and defraud somebody and spot an otherwise unblemished record?

And the prices shown on the board, $10,000 he made, she lost $32,000. That's gross profit. For $100,000 do you think this man is going to blemish his record at this time of his life, a record that he has been so proud of that he worked hard to build? Do you think he is going to do that at this time?

Now, Moody's and Standard & Poor's, the ratings. Well, there is not much to be said about the ratings after Penn Central and New York City and W. T. Grant and what have you. The ratings are the ratings. And with reference to small companies, they don't mean anything.

There was testimony the big companies, sure, there are a lot of requests for AT&T and General Motors, you keep abreast of it. The small companies, there's something like twenty, 30,000 companies. Standard & Poor's doesn't have the manpower to go around. The ratings mean absolutely nothing. You heard Occidental Petroleum, a $4 billion company, has a B rating. That's logical.

Now, we come to a very interesting point. June 24 Mrs. Grupe went to Europe and at the airport who did she see? Her nephew. Who is her nephew? William Morris. Who is he? He was a stock broker, twenty-nine years old. What did she say to him? In essence, she said, "Hey, I have a great stock broker. I paid $100,000 for bonds and they are now worth $170,000 in a few weeks."

Ladies and gentlemen, you don't have to be a stock broker. If your aunt or your uncle or your son or your daughter came up to you and said, "A stock broker made $70,000 for me in a few weeks," wouldn't you ask a question? Wouldn't you wonder, hey, are you sure? Maybe I'd better check this. Are you positive, Aunt Bea? Something strange. But this is a stock broker. He was in the market. He knew you don't make that kind of money overnight unless something miraculous happens.

Did he say, "When you come back, I'll speak to you, Aunt Bea"? No. He wished her good-bye, good luck, and off she went.

She comes back July 2. Is William Morris waiting for her at the plane? No. Does he speak to her? No. His aunt, his beloved aunt who he got a discretionary account from, he doesn't bother to find out what bonds she is holding, whether she is in good bonds, bad bonds, whether she knows what she is talking about. Nothing.

Sometime in July she meets with her sister and brother-in-law, dinner at her house. During the course of conversation, they ask to see her securities. She gives them a list of her securities. They go.

Sometime later, Mrs. Grupe wasn't sure, she happens to go to her sister's on a social visit, and what does her sister day? Well, the family -- "the family" is not defined -- is worried about your securities.

If Mrs. Grupe had not gone over to her sister's, it is very possible we wouldn't be sitting here today, because obviously her sister was in no hurry to tell her. What did her sister say? Did she say, "Bill Morris, my son, my son the stock broker in New York, he called up and said it's terrible, get on the phone right away, speak to him"?

She said, no, maybe we should go down to the library and look in the Standard & Poor's and Moody's.

Now, ladies and gentlemen, her son is a stock broker. If he found that these were junk bonds -- Mr. Rowney testified he would have told her to sell immediately. Wouldn't it have been logical, there is that word again, to get on the phone, call her collect, Aunt Bea, you are in trouble, get down here?

No, instead the word filters down through the sister, and she doesn't even say whether she spoke to her son, tell Aunt Bea to go to the Buffalo library to look something up, Aunt Bea, who is unsophisticated and doesn't know anything about the stock market.

So off she and her sister trundled, off to the Buffalo library, her sister who knows a little more than she does, maybe. They take Standard & Poor's and Moody's down and look through, and right away Mrs. Grupe is in a panic because of C's and CCC's and B's. I asked her, "Do you know what else you read in there?" "No, not really, I didn't understand." But this worried her.

OK, let's assume that's logical. Let's assume that is logical. What does she do? Goes home, maybe the next day she calls up her nephew and says, "I am coming to New York." I believe she said he said, "That's a good idea."

I don't know. Maybe I am crazy. But you will note she finally went to New York July 29, over a month after she told her nephew that she had these bonds that she made $70,000 in a couple of weeks.

Now, is that logical? A dear nephew waited all this time and then let his aunt go to the library to find out she was in trouble? He didn't call her, he didn't tell her. Maybe he didn't tell her because he didn't know. Maybe he didn't tell her because this was the first time he had heard of these. But off she goes to New York.

What did she do in New York? First she got on the phone and lied to John Lamula that she was going to see her son the lawyer, who she never consulted throughout this whole thing. Her son the lawyer in New Jersey. And could he see her while she is in New York? I asked her, "Why did you lie?" "Because otherwise I couldn't get him on the phone."

"Yes, but you were talking to him. Why did you have to lie to him?"

I don't know. But she lied to him.

And she said, "He always avoided me. I couldn't get him when I wanted to talk to him."

Fine. Then she talked to him, and then she changes hotels so he wouldn't be able to see her. First she wants to talk to him and then she doesn't want to talk to him.

What does she do then? She testified on one of the days she is in New York, the night before she asked Mr. Morris to check her stocks, check the debentures, find out what they were selling for.

The market opens at 10 o'clock. 10:10, Mr. Morris is back and tells her the debentures are worth $60,000. You have heard Mr. Rowney, you have heard Mr. Angelo, you have heard Mr. Lamula. These issues are not listed on computers like Mrs. Grupe testified.

What do you have to do? You have to get on the phone and call up each and every marketmaker in these issues to get a quote.

Now, each one had approximately three or four marketmakers. Just by simply dialing the phone, could he get back to her in ten minutes and say, "Aunt Bea, it is worth $60,000"?

That's what she said, 10:10 he had some sort of computer, ten minutes he got me the quotes. OK. And this devoted and good-natured and beloved nephew she gives a discretionary account to. And that is the discretionary account? He could buy and sell securities for her from today to tomorrow without asking her permission. She had just gotten taken, according to her testimony, for $30,000, by a person she trusted, and now she gives a discretionary account to a nephew who didn't even have the courtesy or decency to call her and say, "Aunt Bea, you are in trouble." She says, "Nephew, here's the balance of my money, go."

She doesn't mention anything about income, the way she did to John Lamula. Whatever he buys, fine.

Then she goes down to see Mr. Loeb. Why did she see Mr. Loeb? She saw him for two minutes. Her nephew had the discretionary account, he could have bought and sold. Why was she down there?

Well, let me tell you why she was down there. On August 5 she went down to Mr. Loeb. That was on a Monday. And what did she do after she saw Mr. Loeb? She went to Mr. Blum's office. And I assume they discussed litigation. And when were her debentures sold? Not on August 5, August 6 and 7th, after she had spoken to Mr. Blum and after she had spoken to Mr. Loeb.

What did Mr. Angelo say? "Well, on this one we decided to do it differently because we were thinking of litigation." That's the reason. She was setting Mr. Lamula up. She wanted a lawsuit. Why? You can draw your own conclusions. A woman married twice, alone, draw your own conclusions. Because she knew she had a patsy, she knew she could drive him into the ground, and that's why we are here. She went out and dumped those.

You heard testimony. She bought AT&T stocks, she bought Seaboard stock, the same Seaboard she didn't want to buy from Mr. Lamula she bought from L. F. Rothschild. The same line. All of a sudden it is good when it is bought from L. F. Rothschild, but it is lousy when bought from John Lamula.

MR. BLUM: Your Honor, again, I have no desire to interrupt the flow of this, but I do object to the statement of things which have never been testified, and I don't believe this witness has ever testified as to whether she did or didn't want Seaboard stock. I don't think there has been a word on that. And I must request that counsel limit himself to what has been put in evidence

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and draw the inferences from what actually has been said and not from what he wishes had been said.

THE COURT: There was evidence she did not want stock.

MR. BLUM: That is correct.

THE COURT: To the extent that she subsequently purchased stock, it may show a change in her posture. The only evidence about Seaboard was she had not ordered it.

MR. BLUM: And he cancelled it out.

THE COURT: I don't think she expressed any feeling one way or the other about it.

MR. BLUM: That's correct, your Honor.

THE COURT: All right. Proceed.

MR. GOLDSTEIN: What did Mr. Angelo testify to today? Not Mr. Angelo, I am sorry, Mr. Loeb.

Remember we discussed Southern Company, which is a utility. And he said, "Well, yeah, we had some trouble buying that because utilities were being dumped all over the country as a result of Con Edison.

Now, harken back to Mr. Rowney. Yes, utilities were a good investment. No, they weren't being dumped, only Con Ed was affected. That was some expert witness.

Mr. Lamula said utilities were not good and Mr. Loeb innocently comes up and he backs Mr. Lamula, yes, utilities were being dumped, and at the same time they were being dumped, L. F. Rothschild goes out and buys her some.

That was a good investment. And then they sell it a little while later. She buys $5,000 worth and she makes $500. She made $500 perhaps. We can only surmise what they made in commissions, etc. What her nephew made, her nephew. You heard Mr. Rowney. $500 he would charge. Her nephew, a thousand dollars for dear old Aunt Bea. Give her a special break perhaps. Twice what Mr. Rowney would charge, he is going to charge his aunt for advice.

Now, let's look at this U. S. tax return. You heard testimony. Some of the interest bonds Mrs. Grupe got were not listed on here. Well, look at Exhibit 45 in evidence. These are the confirmation slips from Rothschild. You know what they indicate here as Mr. Angelo testified. Mrs. Grupe got interest on a lot of these bonds. You can total them. They come to approximately $2,000. You will not find that $2,000 on this tax return either. Almost $5,000 in undeclared taxes from Mrs. Grupe, who doesn't understand economics, who doesn't know the first thing about economics.

Finally, we have heard a lot about William

Morris, her nephew, twenty-nine years old. He has an office right here in Manhattan. Her nephew who advised her. You heard Mr. Blum try to get his testimony in a few times over objections. Mrs. Grupe couldn't testify what her nephew told her because it would be hearsay.

Where is Mr. Morris in this courtroom? Where is he? Did you see him? I didn't. Wouldn't it have been logical for them to call Mr. Morris as a witness to buttress what she said, to tell what Mrs. Grupe couldn't get into the record? If it was so important for Mrs. Grupe to get it in, why wasn't he here? He could have been up on that stand and he could have testified. Do you know why? Because when all is said and done, perhaps -- and I don't know -- perhaps Mr. Morris made it very clear to Mrs. Grupe, "If you call me, I'll tell the truth, and the truth may not be what you like."

Where was he? Miss Emerson came down from Cayuga, a great distance. This beloved nephew is right here in the city, He could have been subpoenaed like I subpoenaed Mr. Loeb if he wouldn't come down quietly, if he wouldn't come down voluntarily, and I would think he would be dying to come down and dying to tell you ladies and gentlemen what junk his aunt bought, how she got taken. If it was my aunt, I would have been down here.

If I was that close to my aunt, I would have been the first witness up there. I would have insisted to Mr. Blum, "You call me, I want to testify." He is not here. And why?

I don't have the answer to that. We can only surmise.

In summation, in order to find -- I will withdraw that.

In summation, what the plaintiff is going to seek is that you find that Mr. Lamula wilfully and maliciously defrauded Mrs. Grupe, that he had no reason for thinking these were safe investments even though he put his father-in-law in it and Miss Emerson, no reason for thinking these were safe investments; the sole reason for selling them to her was for his own pocketbook; he wanted a fast buck.

If you believe that, then you must ask yourselves the question, why did it take him so long? Why did it take him so long to do it? He could have done it so much easier. If Mrs. Grupe is naive as she seems to present herself, the first, second, third meeting took place, he could have had all her money and been gone.

No. And you saw the notes. Mrs. Grupe said, "I was mad at him. He bought stock without my permission."

Why didn't she tell him? Why did she write him those notes? Why? I don't know.

Mr. Lamula thought those investments were safe, they were giving her the income she wanted, he stated his reasons. I believe them. Of course, it is up to you ladies and gentlemen of the jury as to whether or not you believe them.

As I said, Mr. Blum will now address you. Please bear in mind that I can't rebut anything he says. I hope you will think about this case in a logical way, and I think you can only come to one conclusion.

Thank you.

THE COURT: Mr. Blum.

MR. BLUM: Ladies and gentlemen: First -- and here I am sure I speak for Mr. Goldstein as well as for myself and for my client -- I would like to thank you for your extraordinary patience and attentiveness in the course of what has been a complicated trial. However you might decide on the issues which the Judge will charge you on and whatever verdict you render, I want to say -- and again, I am sure I speak for my colleague --

MR. GOLDSTEIN: Yes, you do.

MR. BLUM: -- in saying we are grateful for the discharge which you have already shown that you are prepared to make of your civic duty. It recharges the faith of a lawyer in the process of which he is a part to know that jurors are prepared to devote the attention and the intensive care that you have already shown you have brought day after day into this room.

The basic questions which this case raises involve fraud and breach of trust. We contend that Mr. Lamula breached his duty as a trustee, as it were, to Mrs. Grupe, someone who depended upon him because of his greater knowledge of the subject matter and because of what the subject matter was and because of the needs which she brought to him.

We contend that he defrauded her in what he sold her and in how he sold it to her and in how he went about pricing what he sold to her.

I listened with great care to Mr. Goldstein's remarks and there were times when Ithought I might have been in another courtroom rather than this one in hearing him characterize some of the testimony that was given.

I don't believe there is any question in your minds that these debentures were not the safe and suitable debentures, not the securities which Mrs. Grupe expected would provide her with certainty of income which she had at all times advised Mr. Lamula that she wanted, that she wished to have.

Could she speak in the terms of the market? No. Could she talk in terms of the suitability standards of the National Association of Security Dealers? Of course not. She spoke in the terms that you use and she uses, terms used by people in experience with attention to their own problems, but she was presented to a man whom we have heard only today from Miss Emerson she felt she was entitled to trust, and she told him, as she herself testified and as Miss Emerson in the testimony which was read in said, "I'm not educated in ecomonics, John, but I trust you. I don't understand these things that you are telling me, but you appear to know what you are doing. Dorothy tells me that you are a reliable person and I am going to rely on you."

In the last analysis, that is exactly what you do when you walk into the office of a doctor or a lawyer or any professional, not because you may not be skilled in your own field, but because he has the skill in that field and you have to depend upon him.

What is it clear that Mr. Lamula did with regard to informing Mrs. Grupe about the securities that she was buying? Well, one thing is clear. He handed her some annual reports, he says, at some point. We don't know quite when. And he says that he read to her portions of it, and asked her to make notes, and tell him if there was anything she didn't understand.

That would be a little like one of you, like Mr. Tuck walking into my office and saying, "I want to buy a house," and my handing him a book, saying, "Here's a book on real estate law, let me read you two or three paragraphs on how you close title on a house, and then take it out and come back and tell me if you have any questions."

That is exactly what took place here, ladies and gentlemen, with every single one of these securities. She walked into the doctor's office and the doctor handed her a book on pharmacology and said, "Go pick a drug, and if you have any questions, here's a book on penicillin and a book on streptomycin and you read it through and tell me if there is anything you want to know about it before you take this prescription."

The only difference was that if a doctor had donw this to her, or a lawyer had done this to her, because of the common experience we all have in dealing with people or the more common experience, she would have known she was being hustled. But here she sat down with someone whom a friend of hers had said, "You can trust," and she said, "I don't understand this, I hear what you are telling me, but I trust you."

Now, what were these securities that were sold? What were they? Well, let's deal with this label, "junk bonds." We are not saying that those bonds were junk. We are saying that they were junk bonds. You heard Mr. Angelo, who trades $200 million in face amount of those bonds every year, and Mr. Rowny, who has no axes in the fire in this case whatever, tell you what a junk bond is. A junk bond is a speculative security. It is a security for a high-roller, and you know what a high-roller is.

It is a security which, as Mr. Rowney said, no person should put all of his money into; if he has $10 million he shouldn't put them all in those. If he has $10 million, he might be willing to buy $100,000 worth of these things, or $170,000 worth, because he can afford the loss. But Mrs. Grupe had made it clear from the very outset that loss was what she couldn't afford, and Mr. Lamula knew, and there isn't any question about it, and I suggest there is no question in your minds about it, that Mrs. Grupe had this nest egg, and that was what she had, and that was all she had.

She had a pension, she had a job of uncertain

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duration, and she made that clear to Mr. Lamula; and she said she wanted some money. She wanted to be able that she was going to be certain that she would have it.

Mr. Rowney told you how that is understood by people in the investment counseling business if they are dealing properly. They understand that to mean the person wants a certainty of income and that means the investment's got to be safe. And Mr. Lamula himself said he understood that the investments were supposed to be safe.

Shat did he give her? He gave her -- and there isn't any question but that he gave them to her; that is to say, he himself testified that the recommendations were his, not hers; she didn't suggest them; Dorothy Fmerson didn't mention them first. Mr. Lamula himself said it was he who first proposed investment in these particular securities.

And he has also said that he never recommended any security to her, that he himself wasn't a marketmaker for at the time or hadn't at sometime in the past been a marketmaker for.

It's been said by Mr. Lamula himself he didn't discuss with her Treasury bonds in the spring of 1974. He didn't discuss with her certificates of deposit with the interest rate going up in the spring of 1974. He didn't discuss with her good common stocks of the kind that continued to pay dividends or have dividend records, as many of them do, and fine ratings running back for fifty, sixty years. None of those was mentioned to her. Not a one.

He didn't mention to her high grade corporate bonds, bonds of American Telephone & Telegraph Company or General Motors or other companies which have never missed a payment, not just on the interest on their debentures, but have never missed a dividend payment ever, so that people in your situation and people in Mrs. Grupe's situation can count upon that check coming in.

He never mentioned those to her, not once. Not once. Instead, he gave her what he has now dared to call a diversified group of securities. Do you remember that letter he said he wrote her on May 24, I think it was, in which he referred to it? "I feel comfortable when I give you a spread."

Of course he gave her a spread. They were all rated, as we have seen, B's or CCC's or CAA's, or not rated at all. And why in this category weren't they rated? Not because they were government bonds or bank bonds. They were not rated because there wasn't enough information for anybody else to know about them.

Now, this is what he proposed to her. This is what he said was safe and suitable.

What did Mr. Rowney say? Again, Mr. Rowney, who has no concern with this case, who never met Mrs. Grupe until the week this trial started. Mr. Rowney said that these are highly speculative securities, they are real risk property, and particularly considering the market conditions in the spring or the summer of 1974, it just wasn't right to be in it, no way was it right to be in it.

Mr. Loeb, what did Mr. Loeb say? He said he took a look at them. He thought they were speculative. He thought they were low quality, but he called his specialist in one of the major houses in Wall Street and said, "What do you think about it," and you know perfectly well what he said about them.

Let's look a little more about what it was that Mr. Lamula did or didn't tell her. He asked her, "Have you talked to your son the lawyer?" But you heard the answer to the question from the witness. He earlier had told her he didn't know about investments. "Have you talked to your brother in Buffalo or others in your family?" And she said she didn't want to talk to members in her family.

Mr. Goldstein has made his surmises as to why it might have been that Mrs. Grupe didn't wish to discuss her private affairs with members of her family, and I suggest to you, having heard her family history and the breakup of her marriage and the circumstances, that you yourself may understand why it was that at that particular point she didn't think it was her family's business how she went about her investments.

Nor am I aware that there has been any testimony that it is the duty or obligation of a customer, anyone, Miss Hamilton, anyone, to walk into a broker and have to tell the broker who your son is or who your broker somewhere else is or where your nephew is located and what he does so that the person you are going to for advise can give you advice.

Why then did Mr. Lamula do it? I don't want to say, as I suggested, that he did it because he wanted to see if he had what Mr. Goldstein called a pigeon. But I do think he wanted to know precisely how much control he had over the situation. I don't want to say that I think Mr. Lamula set out to cost this woman money. I don't want to say that Mr. Lamula thought that these bonds were going to go down and Mrs. Grupe was going to lose a bundle in them, because I don't think he thought that. But I don't think he cared when he told her that they were suitable, and that's what counts.

The law and the principles of that association of security dealers imposed upon him the duty to care -- as you heard it read to you -- whether or not those securities were suitable. And he didn't care. That much is clear. Maybe it went past that in the non-caring.

Let's look at some of the things he said. You heard him yesterday. He said yesterday that the fact that the common stock had stopped paying dividends was a great reason to buy other securities of the company. You don't have to be experts in the market to know that that's just plain cockamamie. He said that the fact that the earnings of the company were erratic, and that some of them were showing losses, made this a great buy, go out and pick up the convertible debentures. And you know that that's cockamamie. Nobody counseling a client who asks for safe investments suitable for the circumstances that he knew Mrs. Grupe was in could possibly have said that unless he had a total disregard for the truth or unless he knew that what he was saying was false.

Now, it is virtually without limit to explore what it was that he said and how he said it that simply doesn't wash.

First he said, if you will remember, "I didn't talk to her about dividends, didn't say anything about dividends at all." Then a little later on in his testimony, he said, "Oh, yes, I told her about them, but I said to her that's something that will make the debentures a good buy for you; go out and buy them because the company has cut its dividend or the company has stopped paying its dividend."

I asked, if you will recall, "Did you discuss that lawsuit that Mr. Rowney picked up in the annual report?" And he said, "Oh, yes, I told her about it because that didn't bother me, I thought it was a safe and suitable investment for her," and I don't see how there can be too much question that they weren't safe and suitable investments.

What were some of the other things that it seems quite clear that he either told her wrong or that he didn't tell her at all? Let's come to the subject of the ratings. He told her, and there is a difference in the testimony here. I believe Mr. Lamula's testimony was that he said, well, they are B or unrated, but he didn't read to her what a B was, and you will recall, I think, what a B is.

I asked him did he read it. He didn't tell her a B is a sixth grade bond, and that bonds rated as low as B are speculative. Payment of interest cannot be assured under difficult economic conditions. And even Mr. Lamula knew and concedes that the economic conditions were difficult in the spring of 1974.

Some of them were CCC. He didn't tell her that at all. That much he himself concedes. Those were the ones Standard & Poor's calls outright speculations.

So it is quite clear, and comfirmed, indeed, by Miss Emerson's testimony, which we read in, that these ratings were the indications at the very least of Standard & Poor's and Moody's of how these things stood in their eyes.

Now, let's talk about that for a moment. Mr. Lamula says, "I don't follow the ratings."

All right, maybe Mr. Lamula can choose not to follow the ratings, but the question, ladies and gentlemen, is whether or not he has a duty to tell his client what the ratings are and whether they are significant. And remember, according to Miss Emerson's testimony, she asked what the ratings were. And he said, "Ratings don't matter to me," according to Miss Emerson.

Well, this much is clear from Mr. Rowney's testimony, and it is inferred from the testimony of Mr. Loeb, and that's that ratings are dreadfully important to determining whether or not there are customers out there who will buy these debentures when you want to dispose of them.

And once again Mr. Lamula knew that he was dealing with a lady in her late fifties, he knew that her economic circumstances were uncertain; he didn't trouble to ask about her health. He saw there she was, she looked hale and hearty to him, so he asked her no questions. But he had to know when he sold her debentures from 1994, debentures from 1984 or 1981, 1988, 1994, 1983, 1987, 1989, 1988, 1985, 1984 -- when he sold her these he had to know that it was going to be the most difficult gosh darn thing in the world for her to get money out of these unless she survived until the point that they paid. And if the company survived until the point that they paid.

In short, the result of this was to lock her into Mr. Lamula, to imprison her, as his client, his customer, the way perhaps Miss Emerson may be imprisoned in her securities, or we don't know who else is imprisoned as a customer or a client of anyone who sells them these when they are not suitable.

Why? Well, I asked Mr. Lamula, "How long do you expect to be around?" And I think that may have been an unfair question because nobody knows. But this much is clear. To expect this lady to go out, if John Lamula should die or retire, and I wish him good health, but if he should die or retire or go anywhere else, retire to Florida, what was this woman to do if she needed some money for ailment? Live until 1994? That very fact alone suggests how clearly unsuitable, how clearly unsafe, these securities were.

And so I returned to the subject of the ratings.. The ratings affect the availability of a customer to buy these debentures, and there is a duty to tell your customer whether or not you are going to be able to sell what you are giving them. You head the incredible testimony of Mr. Lamula that the fact the market for these debentures was thin, which means there weren't many buyers around, made them a better buy for Mrs. Grupe. That is flying in the face of truth.

People who run up to the company all the time and who talk with the presidents of these companies, like Mr. Lamula did, or said he did, have that special information that may enable them to know if a company is going to go out in the market and buy these things because the market is depressed and the company is doing poorly. He may, a Lamula may know that, but once again, it proffers what the scheme was. It was not to lose Mrs. Grupe money, but to make her a prisoner of Mr. Lamula so far as investments were concerned, that she would have to come to him if she wanted to deal. It locked in a customer. That was one wing of his plan and the other wing of his plan, as you all know by now, the other wing was to make money, because as Mr. Rowney has testified, companies like Mr. Lamula's with four employees full-time and a couple of runners part-time, they were in real desperate financial trouble in the spring of 1974. And Mr. Lamula himself has admitted that his company lost $100,000 in that year, and for a company that has only four employees, that is one whale of a loss.

So the fact that there was a shot at making a profit, as Mr. Lamula did here, as he concedes he did, a gross profit of almost $11,000 on what appears to have been a virtually riskless transaction, was a gorgeous opportunity to try to keep his company afloat.

So there is the other wing of why he did it. He didn't do it because he wanted Mrs. Grupe to lose money. I wouldn't ask you to believe that. He did it because he didn't care whether she lost money. He did it because he cared whether he made it, and he cared, he cared mightily, whether or not he locked in a customer for himself, because that apparently was what Mr. Lamula counted on.

How do we surmise that that was what he counted on? We look at the Seaboard transaction. That is an interesting thing. You all heard the testimony on that.

On the night of June 20, or June 21, 1974, which was a Friday, a Thursday night or a Friday, Mr. Lamula calls Mrs. Grupe, according to him. She says she never heard of it and I believe her, but it is up to you to decide, but let's take Mr. Lamula's side of the story. Mr. Lamula says he called her and he said, "I've got a gorgeous opportunity, I've got a thousand shares that are going up, they are going up, there is going to be an increase in the dividend and I want you to get that profit, Bea, and I'm going to sell it to you and I'm not even going to take a commission on it. Here's a grand chance for you to make a killing."

Did he offer it to the other people whom he regarded generously? Did Miss Emerson, who had sent him this pigeon, get a chance to pick up any of this profit? No way. Here's a company that was losing at the rate of $100,000 for that year, here's a man who knows that the stock is going up, here's a man who has a few shares of it in his portfolio at the time, right there in his account, and he gives it all to Bea Grupe? It is simply not credible. It just can't be believed. If that cannot be believed, there is a whole lot else that was said that can't be believed.

I think you can figure out pretty well what happened. He figured because of the ease with which he got her to swallow the additional purchase of Technical Operations a few days before, that he probably would be able to shove this one on her. A $25,000 transaction. So he waited until she was about to depart for Europe. Then he wrote her a letter and he said, "You have got a chance to make a fast profit in this."

That wasn't what she had said her investment objectives were.

He gave up his opportunity to make this big win? He had an opportunity to plant this one on her because he had his pigeon. So he gave it to her, and then while she was in Europe, along came news or information the stock was going to go up? What did he do? He wasn't going to hurt her by cancelling the transaction, so he marked it CXL on the sheet and put the money back and reversed the transaction, and now he was holding it with a chance to make a win on it himself, and indeed, as he said in answer to the Judge's question, he ultimately got rid of that Seaboard at a profit.

You have to decide whether or not that little episode, taking $25,000 and presenting it to this lady, a $25,000 purchase alone, of all of his customers, really occurred or whether in fact he had a pigeon.

I think it is quite clear that whatever Mrs. Grupe had said, she certainly wasn't prepared to dig to the bottom of her savings to take up that last bit of money to relieve John Lamula of a risk that he had.

Now, let's turn to this question of subordination. We talked a little bit about that. John Lamula didn't tell her what "subordination" meant. He didn't tell her a subordinated debenture was something that came after other obligations of the company. Mr. Rowney told you what that meant.

He didn't discuss the workout in which he himself was. We had a definition of that term I can recall for you. Mr. Lamula didn't maintain much of an inventory in these things. You all saw the chart and recall the difficulty I had in getting him to concede what his counsel admitted, that he was without inventory in virtually any of these until a few days after he knew Mrs. Grupe was not going to talk to her lawyer son and a few days after he knew Mrs. Grupe wasn't going to talk to anybody else.

Then he began, when a few bucks became available, here and there to round up this collection of low-rated junk bonds.

When he had them all set for her, or her all set for them, whichever it was, that was when he put the transaction through.

No question that he controlled the timing. And now we turn to Miss Emerson's testimony today. It was short testimony. But you recall I asked her in cross-examination about Exhibit 20. You may not remember, but this is Exhibit 20. It is the sheet that Mr. Lamula says he gave to Mrs. Grupe after the transactions took place, on which it shows the price at which she would be buying each one of them in the column marked "price," and on which it shows the income pro rated to May 29, which was the date on which he had determined he would finally be able to complete his own inventory so he could deliver it to her, or maybe it is May 30, or maybe it is May 31; we don't know which. But what a revealing piece of testimony that was, ladies and gentlemen. Here was Miss Emerson, totally innocent of knowledge of what had gone on here before, significant that John Lamula had pegged the prices at which he was going to sell these and that he knew it all along and handed her a piece of paper. Did he hand it to her then or didn't he hand it to her then? I don't know. But let's see how it fits in with the other testimony that's been given.

We don't know if it was May 22, 22 or 23. We know every one of the advices sent out to Mrs. Grupe wherever they were sent said May 22, and we do know there was that extraordinary procedure which took place, which any secretary would regard as a most extraordinary procedure, that Mrs. Vena wrote into a diary at the time that she telephoned Mrs. Grupe to say please change the dates on these things when they come in, and Mrs. Grupe said, "Fine, all right, I'll do it," M for Minnie.

It raises a substantial question as to what the date was. This whole business of the machine raises a substantial question as to what the date was. And of course perhaps most revealing as to what the date was is the one excerpt of the diary which was overlooked, which you all saw a day or so ago, "Met Grupe today. Review items pruchased 5/21."

So what do we have? We have Mr. Lamula going out on May 21 and buying, I think it was 120 of 170 bonds, debentures, that he sold her, and a few days later, on June 3, he went out and got five more Technical Operations and sold those to her on the same day, same technique.

Now, is there any real question in your mind but that the prices were pegged and determined by Mr. Lamula without any real reference to the market?

You all saw those slips, and they are all covered in these sheets which we prepared, Plaintiff's 165. You heard Mr. Angelo, another fellow with no axe to grind, who said it is unusual, it is very unusual, it is most unusual, that might happen, but all of them together, it is unheard of that in instance after instance the price would be fixed at a level which bears no relation that anyone can conceive to what these companies were putting in the yellow sheets. Not some of the companies. Some of them may have left their bids in the yellow sheets unchanged. But if you look those sheets over, as you can, if you wish, in the jury room, if you look over the 165 sheets, you will see changes in them from day to day so the reputable marketmakers like Wechsler and Krumholz and Murphy & Durieu and Carl Marks and even John Lamula Investors were putting bids in the sheets, and they didn't relationship at all to these.

What can a man say, that he will sell anybody who calls him at 48 and sells them at 59 to his pigeon? It is remarkable, really remarkable, and I think once again, he didn't think she was going to lose money on it, or at least he hoped she wasn't going to lose money on it, but you know what he did was he cast to the winds any concern about whether she was or wasn't, because he had the chance to get a little money for himself. And that's what he went out and did.

It just seems to me absolutely clear that that is what was done.

Now, Mr. Goldstein has said, "Why didn't she speak up? Why didn't she give him more information?"

I think you know the answer to that one, too. She was intimidated by his knowledge. You go to the doctor and you have got a pain in your hip and the doctor examines you, and he says this is what you ought to do, you ought to take this medicine. You say, "Doctor, why do I take those pills?"

No, you don't say, "Doctor, why do I take those pills?"

In your mind at least you say, "Doctor, I trust you, that's why I am here."

That's why she was there. She relied upon him. She counted upon him and she told him that she was counting upon him.

And she was intimidated past the point perhaps if she saw something here or heard something that didn't make sense to her. I don't believe he said to her the fact the stock of this company is dropping in the market and the fact it cut out its dividends makes it a great opportunity for you to buy a safe debenture. I don't think she ever said that. I think it is clear if he ever said that, from her testimony, she would have climbed up the walls and through the ceiling.

If he ever told her, "I'm going to sell this myself and make $11,000 out of this to boot," she would have pushed him out of Miss Emerson's apartment or walked out herself. Or if he told her any one of those other things they didn't tell her -- if he told her "subordinated" means it comes after all the other debt, I don't think she would have been faintly interested.

If he said, "I don't think you are ever going to be able to sell these, but you will have to hold it if you live to 1984 if you and the company live," I don't think she would have bought it.

If he read off a B bond or CCC bond was, there was no way she was going to stay still for that.

No, the technique here was a mixed technique. Mr. Lamule cajoled her, told her some things in great detail, he omitted to tell her other things that might have been important. He plaued upon the fact that she was dependent. There doesn't seem to be a real question about it.

Now, let's turn to what happened with Mr. Morris.

I don't quite understand why Mr. Goldstein comments on the absence of Mr. Morris from the trial.

I have a suspicion that if I had started my trial, as he suggested that I do it just now with Mr. Morris as a witness, why, he would have said, "Isn't that nice, you put her nephew on the stand to tell you what lousy stuff this was." I don't think you would have had a moment's hesitation in knowing -- I don't think you would have a moment's hesitation now in knowing why Mr. Morris wasn't on the stand. I don't want you to reach a conclusion and Mrs. Grupe doesn't want you to reach a conclusion on the basis of testimony which you think could have a shadow of bias or untruth to it, and you all know, everyone of you, what Mr. Morris said and did.

She saw Mr. Morris at the airport and she said precisely what Mr. Lamula said in that letter of May 24. "I have given you $170,000 at face value for $96,900," and that's what she said to Mr. Morris, and that's what each of you would have done in the same situation if you were there.

Here comes her nephew. She discovers he is active in this area. She says this fellow is great. What -- this is my time notice, ladies and gentlemen.

Thank you.

It is also assurance to you that I am not going to be able to din at you more than ten minutes longer.

What did Mr. Morris do? Mr. Morris was told, he was told, "I got these things." That was a highly unusual condition, as Mr. Rowney said, in the spring of 1974. So what happened when he came back? Well, we don't know from testimony that was given what Mr. Morris said or did, but you don't have too much trouble figuring that out because when Mrs. Grupe got home, her brother and sister-in-law said, "Bea, I would like to see this for the portfolio of yorus, this list of securities."

She gave the list of securities, then you know what happened with them. They went maybe to William Morris in New York. This wasn't his client. It was his aunt. He treated this with the dignity she was entitled to. He called his mother and his mother said to her sister, Mrs. Grupe, the family is concerned. You bet your life the family was concerned. They had plenty of reason to be concerned. What did she say? I think she must have been indignant. "But Mr. Lamula has told me all these things."

So they said, "Let's check," and they went down and checked and then she called Will Morris. Is there any question in your mind what Will Morris said? You know what Loeb told Mr. Morris and you know what Loeb himself thought because he has told you, and you know what Mr. Rowney, who, once again, had no axe to grind, thought about this.

No, I would rather have thought that Mr. Morris' absence reflects on Mr. Goldstein's unwillingness to have yet another person tell you that these were junk bonds, that they were unsuitable, that they were risky, that they were not reliable, and that they weren't safe.

And I rather think that you can draw the conclusion from his absence not that I wanted to conceal something from you, but that Mr. Goldstein, quite the contrary, who could have sent a subpoena there as he did to L. F. Rothschild, new quite well what the information would be.

So what have we as we come through to the bottom of this case? We have a lady who went to someone she trusted; who was unknowing about market affairs; who put her money in a bank because as far as she was concerned, you start with a bank and then you find someone to help you.

She put it in a certificate of deposit. Did she know the interest rate was going up? We knew perfectly well she couldn't have known that. You walk into your bank and ask them what rate they are going to charge you if you want to take a loan out six months from now. They will treat you politely and tell you to come back in five months and twenty-nine days and then they may be able to give you some kind of estimate.

No. What you heard rather was what Mrs. Grupe said. Mr. Lamula told her, "You better watch out, the Frankling National Bank folded and other banks have folded and you yourself had better take care to put this in this fine, safe, suitable package of investments that I have assembled for you."

And she relied upon him. Was she wise to rely upon him? Obviously not. Did he mean to take her? Maybe not in the sense of taking her money, but did he intend to deceive her? You bet. He intended to deceive her, not let her know things she needed to know, things she has said would have affected her decision, and he intended equally to take that profit, which in fact he took. That profit, which was a risk-free profit, because there can't be any question about it that he walked out into the market on day one and he controlled how the days were numbered and sold to her on day one, or maybe day two, or maybe day three, but that was all in his control.

So we have an unsophisticated customer, we have an unscrupulous dealer, we have unsuitable securities. The only thing I hope, ladies and gentlemen, is that in presenting this to you it will not be too unwieldly for you to deal with, but I think each of you in your own minds knows what happened. Each of you knows that Mrs. Grupe depended upon someone who deliberately and with intent to deceive her took advantage of her reliance and attempted to make a profit for himself and caused a loss to her. And that is why she has turned to you and that is why I turn to you and that is why our system of justice turns to you to make a decision as to what is to be done about it.

THE COURT: Ladies and gentlemen, in the morning I will charge you on the law and you will commence your deliberations at that time.

In the interim, do not discuss the case. The discussions will start tomorrow after I have charged you on the law and you will then commence your deliberations. The jury is excused for tonight.

MR. BLUM: 10 o'clock tomorrow, your Honor? I think Mr. Hamilton is asking.

THE COURT: Yes.

(Jury excused)

THE COURT: Gentlemen, I want to congratulate you on summations that were both eloquent and brief and to the point. Had we gotten to the point so rapidly in the evidence, we would have concluded the case much sooner.

If you wish to discuss the charge with me further, particularly from the standpoint of where you think the charge belongs and with respect to the questions, I'll be available in chambers in about ten or fifteen minutes, but not for a terribly long period of time. I am presiding in a moot court at Fordham Law School tonight and I have to get up there fairly shortly.

MR. BLUM: May I make the suggestion, if it is no inconvenience to your Honor, we ourselves ought to review this because you have given us a great deal to work over and my secretary has notes to revise. Would there be any opportunity if the two of us could be here at 9:30 tomorrow to meet with you in chambers?

THE COURT: All right. Come in around 9, if you can make it by then.

(Adjourned to November 5, 1976.)

BERNICE C. GRUPE

v. 75 Civ. 2083

JOHN LAMULA INVESTORS, INC. and
JOHN J. LAMULA

November 5, 1976
10:00 a.m.

(In open court; jury present.)

THE CLERK: The Court is about to charge the jury. Will the marshal please lock the door.

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CHARGE OF THE COURT

Mr. Foreman -- and I should explain to you that in our federal system the first juror selected is the foreman, and that makes you the foreman -- ladies and gentlemen of the jury:

First of all, I wish to express my thanks to you for the time and consideration that you have given to this matter. I know that jury service is an imposition on many of you and interferes with your personal affairs. On behalf of the Court, and counsel for both parties I want to thank you for your presence and careful attention.

Your particular part in this process of ours, the administration of justice, is about to take place. That is the consideration of the evidence. Before you enter upon your deliberations, I wish to charge you first as to how to go about your work, and at the same time tell you what the law is in relation to the issues which have been on trial before you.

You and I are partners in this process of administration of justice. It is my province to instruct you on the law which governs the case and on this you are required to accept my instructions. Ignore any contrary interpretations of the law that may have been stated by counsel in their closing arguments.

It is your function, on the other hand, to determine the facts, and your determination as to the facts is conclusive. It is your recollection of these facts which governs,and should that recollection differ from that of the lawyers or from my recollection of the facts as I may give them to you, please disregard anything that we have related.

Of course you will consider only the facts which have been developed at the trial. You will not be swayed by anything which you may have read and which you may have seen on radio or television. It is just what you have heard here in this courtroom that is important.

At times throughout the trial I have been called upon to make rulings on various matters of law. I have sustained objections, I have overruled objections. Please do not draw any inferences from the fact that I have sustained or overruled objections.

If during the trial I have said anything or indicated anything in my questions which leads you to believe that I am inclined to favor the position of one party or the other, disregard that completely. It is not my intention, and I do not intend, to encroach on your function in determining the truth of this case.

I asked a number of questions during the course

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of the trial. These questions were put purely for purposes of clarification, to attempt to make matters more understandable to you, for this has not been a simple case.

You have heard the summations of the lawyers, and these were designed to bring before you in summary fashion all of the evidence tied together for your benefit. But if you should find that counsel, or either of them, went outside the record disregard that part of what they said.

You have heard testimony on both sides here, some of which has been conflicting in nature. How do you determine the weight which you will give the testimony of the various witnesses? How do you determine if they are credible, if they are telling the truth?

In this, ladies and gentlemen, you just use your plain everyday common sense. You saw the witnesses on the stand, and you have heard another witness through deposition as well as briefly personally. How did the stories impress you? Did they appear to be testifying frankly, candidly, fairly?

In other words, in evaluating the testimony and credibility of the witnesses, please apply your common sense and experience just as you do in determining any other

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important matter in your own personal lives.

You are often called upon in your day-to-day living to decide whether you have been given a true picture or not a true picture in any given situation, and this is not any different from that. You will make your decisions as to whether you have heard the truth or not just as you do in your everyday life.

I suppose you would naturally consider a witness' demeanor, his background, his candor or lack of it, possible bias, means of information, or his accuracy of recollection. You will consider whether a witness' testimony is supported or whether it is contradicted by other credible testimony or circumstances or documents.

You will consider, of course, whether a witness has an interest in a case, because where a witness has an interest in the case, in the reault, there may be a temptation to color the testimony or possibly to withhold facts. This does not mean, ladies and gentlemen, that a witness will falsify because he has an interest. It is merely one of the factors you will consider.

The plaintiff and the defendant are interested witnesses and, accordingly, their testimony should be weighed with care. In the weighing of credibility of all witnesses you are to take into consideration the interests of that witness, including the fact that he is employed by a party to the litigation.

Incidentally, I very often use "he," but it is used in the general sense; it can be "she" as well as "he," and when I say "him" it could be "her."

Also, while I have been speaking of the defendant there are in fact two defendants: There is John Lamula, the individual, and there is John Lamula Investors, Incorporated, of which he is the president.

I will address myself to the distinction between these two and the connection between them later on, but for the time being I am simply going to say the defendant, by which I mean both John Lamula and his company.

Should you find that any witness has made a material misstatement with the intention of misleading you, you may disregard that part of the witness' testimony, or you may disregard all of that witness' testimony if you do not believe it, or you may accept a part of it if you find it to be reliable and disregard the rest.

You should also consider the strength or weakness of a witness' recollection, for sometimes while a witness may not be lieing or intending to deceive a witness may have a weak recollection on a subject or may be incapable of accurately setting forth what he observed or did. All these factors you may consider in judging credibility.

If you find that a witness who has knowledge of pertinent and material facts is in the control of a party and that party fails to call such witness or explain his absence you may infer that the witness would not have corroborated such material testimony in the case as he was in a position to controvert. And you may also infer that had such witness been produced his testimony would not have been favorable to that party.

The same applies to documents that were not produced, if any.

Certain of the evidence is embodied in stipulations to which both sides have agreed. Such matters are undisputed and you shall accept the stipulations as accurate.

Evidence may be direct or circumstantial. Direct evidence of an event is the testimony of an eyewitness who says that he saw it happen. Circumstancial evidence is evidence as to the existence of certain facts from which one may infer the events happened or did not happen as described. You may consider both types of evidence.

You heard substantial evidence from several witnesses who were presdent during these series of meetings that occurred in the spring of 1974. They differed in their versions of what was discussed and what was said. It is for you to determine the truth of those meetings and discussions.

You also heard substantial evidence concerning the securities involved in this litigation and their suitability. It is for you to determine that question.

There also will be for you two issues on which you must consider circumstantial evidence. One concerns the purchase of debentures. Two-thirds of the debentures involved in this suit were purchased a day or two before the sale to the plaintiff. It is for you to determine whether as the defendant claims he purchased them for inventory and not with the fixed intent and knowledge and ability to sell them directly to the plaintiff.

The plaintiff, of course, claims that these securities were purchased on a riskless transcation where the defendant knew that he could just pass them right on to the plaintiff and thereby bear no risk in having them.

It is for you to determine the truth of that issue.

There also is an issue as to what the market prices were on the day of sale. There was substantial evidence concerning when the sale took place, whether it was the 22nd or 23rd. There was a dispute concerning the prices that existed in the market on that day, and whether in fact the prices over the phone were given to Miss Vena as she claims they were. That, too, is an issue for you to determine.

There are many other issues to be determined, and I do not want you to believe that my highlighting these few is intended to be complete. I am not going to attempt to go over all the issues in this case with you at this time. I will touch on a few of them later on, however.

You will base your verdict on your own recollection of the evidence, and my reiteration of certain facts is not intended to limit the evidence which you may consider. My summary of the facts is intended to help you refresh your recollection.

As to the law which governs this action essentiall the plaintiff here, Mrs. Grupe, is complaining that the defendants, both Mr. Lamula, and the corporation which bears his name, have engaged in fraud. For the purpose of this transaction there are two types of fraud for you to consider. The first of these is a claim of fraud under the federal securities laws. These laws require fair dealing by all requiring all material information to be disclosed when a purchase or sale is sought or made, and for

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nothing to be deliberately falsified or deliberately omitted which is material.

Mrs. Grupe has charged Mr. Lamula and his company with violating the antifraud provisions of those federal laws. She has also charged he and his corporation with what we call common law fraud.

The difference is important because the damages which are awardable vary between securities fraud and the common law fraud. There is also a different burden of proof involved in proving the common law fraud in order to get the additional damages, something I will mention later on.

Mrs. Grupe has said that wholly a-art from the federal statutes the defendants deliberately misrepresented certain facts to her in their dealings with her, and that she relied on these misrepresentations to her damage.

At common law, the law of the State of New York, which you must also apply, one who represents as true that which is false, or who wilfully represents as true that which he does not know to be true, or who conceals the truth, and who does so with an intent to deceive the person to whom such representation is made, is liable to that person if that person, believing the representation to be true, acts in justifiable reliance upon it and suffers damage as a result.

Moreover, under both the federal securities law concepts and the common law principles, if a defendant has special knowledge of a subject or special skills, and knows that the plaintiff does not, and is relying on his opinion as an expert, or reposes special trust in him as the result of his superior knowledge, then this imposes a special responsbility upon that defendant to avoid misleading the trusting plaintiff.

The burden of proving the existence of fraud either under the security law or common law is upon Mrs. Grupe. For securities fraud she must establish by a preponderance of the evidence the existence of all the necessary elements of the wrong she claims to have suffered. First, misrepresentation about or failure to state a factual information. Second, the materiality of the facts in question. Third, the intent of the defendants to deceive her. Fourth, her reliance upon the defendant. Fifth, the damage suffered by her.

As to common law farud, there are some additonal elements and there is a somewhat different burden of proof. It is not mere preponderance, it is clear and convincing evidence.

Common law fraud consists of six elements, each one of which must be present in order for plaintiff to recover on this ground.

The six elements are:

One: representation of a material fact to the plaintiff.

Two: representation being false.

Three: The representation either known to be false when made or made recklessly without regard to its truth or falsity by the defendants telling plaintiff that the representation was true according to information in the defendants' knowledge while the defendants did not have such knowledge.

Fourth: Reliance by plaintiff on the aforesaid representation and being deceived by those representations.

Fifth: Plaintiff acting as a reasonable person would in reaching a decision in reliance on those representations.

Sixth: Proof that the false representations were the proximate cause of the injury.

In this case the first question for you to determine is what John Lamula said to the plaintiff. If what he said was a statement of opinion and was so represented rather than a statement of fact, defendant cannot be held responsible if he actually held such an opinion, for opinions are matters of judgment for which law does not impose liability.

If you find that the defendant John Lamula stated in words or substance that what he was saying was factual, your findings will be that he made a representation of fact. If you find that the said defendant made a representation of fact you must next consider whether that representation was true or false. If you find it was false you must then determine whether the defendant made the representation with intent to deceive the plaintiff.

Even if you do not find that the defendant knew his statement to be false at the time it was made you may under all the circumstances present in this case infer that the defendant intended to deceive, provided you also find that the statement or statements were false or were made recklessly and were made with the pretense of knowledge that it was true when in fact the defendant knew he had no such knowledge.

I emphasize that in this case it is not enough that the statement was negligently made unless you find it to be sufficiently gross negligence -- that is, reckless negligence. You cannot find that there was an intent to deceive unless you find that the statement was in fact made recklessly.

This pertains to the common law fraud. It does not pertain to the securities fraud. There is a crucial area of difference.

If you find that the defendants knew the representations to be false or made the representations recklessly without knowledge whether it was true or false, you will then have found that there was an intent to deceive, and you must proceed to determine whether plaintiff believed the representation or representations and acted in justifiable reliance thereon.

In this case you are dealing with the professional investment counsel and the company on one side and with an individual who may or may not have had some sophistication in the world of investment,depending upon your findings in this case.

On the other hand, if the statements were such that plaintiff had a right to rely thereon then your finding on the issue of reliance would be for the plaintiff, and you must then determine the final element of damages.

Under both the federal securities laws and the common law of the State of New York the corporate defendant had an affirmative duty to supervise the business, acts, and conduct of its employees, even its principal employee, Mr. Lamula, whereas here it is clear that the corporate defendant was fully aware of the specific acts that the plaintiff complains of.

I charge and instruct you that if you find that Mr. Lamula's acts were themselves violative of the federal securities law, or if you find that they violated his common law duties to Mrs. Grupe, then you must return a verdict against the corporate defendant in exactly the same amount as any verdict which you find against Mr. Lamula himself.

On the other hand, for example, if you should find that Mr. Lamula was not personally responsible for erroneous market prices as determined by Miss Vena and as set by Mr. Lamula's brother, then you may find against the corporation while not finding against Mr. Lamula personally.

A brokerage firm is itself liable under the securities law for all of the acts of its managers, officers, and directors.

We realize that the law that I have just charged you is extremely complex and very difficult for you to understand. To attempt to make this decision easier for you we are submitting to you for decision a series of reasonably short questions to be answered yes or no. Each of them concerns a factual issue dealing with liability. You will have to go through these questions which ask for a yes or no answer. When you have done that you will submit them to me and we will determine whether plaintiff is entitled to damages.

There are several theories of law stated here. Depending upon which ones, if any, you find for the plaintiff, different charges with respect to damages will have to be given to you, so we are initially only determining the question of liability. When you have come back with your answers on that I will then charge you on damages, if you have found for the plaintiff on any of the claims.

I should also tell you that while we attempted to make these questions as simple for you as we could it was not always possible to do so. Sometimes these questions get tangled up in double negatives, and it is a little difficult to tell whether by answering "yes" you are finding for one side and by "no" for the other side. If you find you have anydifficulties in that regard you are to come back and ask for instructions and I will attempt to clarify the question for you so you will know what it is you are deciding.

The first question reads as follows:

Do you find that the debentures recommended by Mr. Lamula to Mrs. Grupe were suited to Mrs. Grupe's needs and to her investment objectives?

You will answer that yes or not.

Then if you have answered it "yes," you are

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asked to identify the individual securities bought by Mrs. Grupe which you regard as suitable.

You may answer "all," you may anser "none," or you may divide it up.

In dealing with suitability you must determine whether Mr. Lamula understood or reasonably should have understood Mrs. Grupe's investment objectives, and then you must determine whether the debentures which Mr. Lamula sold to her were suitable in light of such objectives, as the defendants claim, or whether they were, as plaintiff claims, vastly unsuited to her needs.

Article II, Section 2, of the National Association of Securities Dealers Fair Practice Rules prohibits the sale to a customer by a broker or dealer of unsuitable securities. The rule which I believe was read to you several times in court is as follows:

"In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such sustomer as to his other security holdings and as to his financial situation and needs."

Mr. Lamula, therefore, was required to have reasonable grounds to believe that the securities sold were suitable for Mrs. Grupe.

The second question you will be called upon to decide is:

If you found that the debentures or any of them were unsuitable for Mrs. Grupe, do you find that Mr. Lamula knew or reasonably believed that the debentures were unsuitable for Mrs. Grupe when he recommended that she buy them, and that he intended that she rely upon his recommendation and that in fact she did rely in buying them?

You will first answer that yes or no. But then you will be further asked: If you answer it "yes," do you find this to be so not only by a preponderance of the evidence but also by clear and convincing evidence?

Now, this is important, because you may find it to be so by a preponderance of the evidence but not by clear and convincing evidence, and the difference there is he can be charged with liability under the securities laws on the preponderance of evidence but on the common law fraud it must be clear and convincing evidence, and that is why you are asked to what degree you have found it.

The rules of fair practice of the National Association of Securities Dealers may be considered by you as an expression of the security industry itself concerning what constitutes proper conduct,and the violation of those rules under certain circumstances amounts to fraud under the federal securities laws and under the New York State law as well.

The third question you are going to be asked to determine is:

Do you find that during a meeting when Mr. Lamula recommended to Mrs. Grupe that she buy the debentures Mr. Lamula made any untrue statements about the debentures to Mrs. Grupe, and on which statements Mrs. Grupe reasonably relied in permitting them to be bought?

If you find that to be a "yes" answer then you have to answer the second part:

Do you find Mr. Lamula intended to deceive Mrs. Grupe by such statements?

Then again goes to the question of common law fraud. Mr. Lamula can be found by you to have committed fraud with respect to the recommendations of the securities if it appears from the preponderance of the credible evidence, (1) that he knowingly made untrue statements about matters material to the investment and she relied upon them; or (2) omitted to tell her certain matters material to the investment in pursuance of a deliberate plan or scheme to obtain her consent to the purchase; or (3) if the securities were in fact unsuitable for her and Mr. Lamula knew it when he

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recommended them to her.

To find against the defendants on the allegations dealing with statutory fraud you must find that they misled the plaintiff and misrepresented important facts to her.

While it is not necessary to determine reliance by the plaintiff to the extent found in commonlaw fraud - it is still necessary to determine the plaintiff relied to some extent on the defendant's statements.

The burden lies on Mrs. Grupe to show by a preponderance of proof that she relied on any statements made by Mr. Jamula which you, the jury, may have determined were false. She must also show she was justified in relying on such statements. Whether she was justified indoing so generally depends upon whether the facts misrepresented were ones that a reasonable man would consider important in reaching a decision as to whether or not the specific security investments should be made.

Moreover, even if you do not find that a reasonable man would have relied on such representations, I instruct you that the plaintiff has satisfied her duty of showing reliance if you find that the defendants knew or believed that Mrs. Grupe would rely on the representations as important and would rely on them.

I am not certain I stated that last sentence correctly, and I will give it to you again.

The plaintiff satisfies her duty of showing reliance if you find that the defendant knew or believed that Mrs. Grupe would regard the representations as important and would rely on them.

In the case before you Mrs. Grupe has charged that Mr. Lamula omitted to inform her about a great many matters: the current market price of the securities, the fact that his firm was a market maker,the nature of his own market position in the debentures, the ratings of the debentures, and other facts relating to the suitability of these as investments for her.

As to any of these, if you have found that Mr. Lamula deliberately, with intent to defraud, omitted to provide such information to Mrs. Grupe in order to mislead her, then as to these matters reliance need not be shown in determining whether defendants committed fraud.

So you have two possibilities, an intent to defraud on the one hand, or reliance by the plaintiff reasonably upon these representations.

I have previously told you that one of the elements necessary to be proven by the plaintiff in showing that fraud was practiced upon her is that Mr. Lamula intended to deceive her. Therefore, if you found either that Mr. Lamula told Mrs. Grupe things which were not true or that he omitted to tell her one or more facts material to her investment decision, then you must consider whether such conduct was engaged in by Mr. Lamula with the intent of deceiving Mrs. Grupe.

Mrs. Grupe does not have to establish this element by direct evidence -- that is, by showing that Mr. Lamula said or wrote that he intended to deceive her -- this is something that almost never occurs. Rather, you may infer Mr. Lamula's intent to deceive her from the circumstances of the case.

Thus, you may consider whether the profit taken by Mr. Laumula on the transaction as a result of the prices charged by defendants to plaintiff was such as to warrant the inference that Mr. Lamula deceived Mrs. Grupe in order to get that profit.

You may consider the size or importance of the transaction to the defendants in determining whether they intended to deceive her. You may determine whether the factors omitted by Mr. Lamula in recommending the securities to Mrs. Grupe were factors which are normally discussed in giving investment advice, so that the inference may arise that the omission to discuss them was the result of a deliberate intent to deceive.

In like fashion, consider whether the false statements, if you have found that any were made, were by their very nature statements which Mr. Lamula must have known to be false when he made them, again giving rise to the inference that he intended to deceive her.

If you find by preponderance of the proofs that the defendant manipulated the prices at which they sold the different debentures to Mrs. Grupe so as to allocate among the various debentures issues the full sume which Mrs. Grupe had available for investment, you may infer that Mr. Lamula intended to deceive Mrs. Grupe, but you are not compelled to reach that decision. It is merely a factor which you may consider.

There was testimony by plaintiff that defendant John Lamula lectured her about various terms, such as debentures, as well as reviewed some if not all of the annual reports of the companies, and other material. Plaintiff has testified that she had degrees, including a masters degree, and specialized in teaching reading. She also stated that she had been a consultant for IBM, and also acted as a consultant for the State Education Department at a per diem rate.

Under the circumstances, you must decide whether

John Lamula could reasonable have assumed from the plaintiff's failure to question him during his lectures that plaintiff understood what he was talking about.

If you find that under these circumstances John Lamula reasonably believed that plaintiff understood all he was saying, then he did not have an intent to deceive her in that regard.

The fourth question you are called upon to decide is:

Do you find that Mr. Lamula did not inform Mrs. Grupe in the course of recommending the debentures to her that he was selling them to her himself as a market maker for his own account?

Again, if you answer that question "yes" you are called upon to say whether this was done with an intent to deceive.

If from the preponderance of all the evidence before you you find that the defendant engaged in a scheme or plan the purpose of which was primarily the sale to Mrs. Grupe of securities for which Mr. Lamula was a market maker, at prices which were substantially within Mr. Lamula's control, and that he did not reveal to her that he was a market maker and had such control, you may infer and conclude that defendants intended to deceive Mrs. Grupe.

Mrs. Grupe has claimed that Mr. Lamula did not advise her as to the fact that he was a market maker with respect to each of the debentures he recommended that she buy. Mr. Lamula admits that he was indeed a market maker for such securities, but he has testified that he told her he held these securities in hiw own inventory, and that his firm had assumed the obligation to buy or sell such securities for its own account and for its own profit in order to create a market for them.

This is a factual issue for you to determine. If you find that Mr. Lamula failed to advise Mrs. Grupe that he was a market maker for all of the debentures, then you may find that Mr. Lamula omitted to inform Mrs. Grupe of a material fact as to her investment decision.

The fifth question for you to determine is:

Do you find that Mr. Lamula did not inform her in the course of recommending the debentures to her that he would buy for inventory most of the debentures actually sold only after he was reasonably sure that she would buy them from him?

Again, if you answer that question "yes" you are supposed to indicate whether this was done with an intent to deceive.

Also, if you find that to be "yes" as to both, whether this has been proved by clear and convincing evidence.

You have heard reference to the term work out market. This means a state of affairs where a dealer in securities does not keep any of the securities on hand but instead only buys the securities for his own account when he knows or believes he has a customer willing to buy them from him.

Defendant denies this was the case, and claims that he had these debentures in inventory. But if you find that Mr. Lamula did maintain a work out market with respect to any or all of these debentures, and if you further find that he failed to inform her of such a fact, then you may find that Mr. Lamula omitted to inform Mrs. Grupe of a fact material to her investment decision.

Next comes a series of questions concerning matters as to which it is claimed that Mr. Lamula omitted to inform Mrs. Grupe of important and material facts. There are six of these. They are all listed in question 6:

In the course of reocmmending the debentures to plaintiff, did Mr. Lamula inform her of the following matters:

1. How the leading rating services rated these debentures.

2. What market conditions, market activity or market prices were with respect to these debentures.

3. Of other material matters respecting the debentures and the companies issuing them and their market quality.

4. Of other investment opportunities of a suitable nature for her at the time which she should consider.

5. That she could not expect to acquire $12,000 yearly from her investments unless she bought speculative securities involving great financial risk.

6. The extent of the risks involved in purchasing these securities.

If you find the answer to any of these questions to be "no" -- that is to say he didn't tell her these things -- then you will be asked in question 7 as to whether this was done with an intent to deceive and, if so, which ones.

And in question 8, if you have answered "no" to any of the questions, that Mrs. Grupe would not have purchased the securities if she had known of these matters that were not told to her.

With respect to the matter of ratings, as to which you have heard a lot of testimony, Mrs. Grupe has claimed that Mr. Lamula did not advise her as to the ratings assigned to each debenture in question by any of the principal rating services. Mr. Lamula has testified that he did not rely upon these rating services and made his own evaluations of securities. But if you find that Mr. Lamula failed to advise her of such ratings, and if you further find that such ratings were sufficiently low that had she known the ratings status of each such security that this would reasonably have affected her investment decision, then you may find that Mr. Lamula omitted or refused to inform Mrs. Grupe of a fact material to her investment decision.

The essential question there is whether Mr. Lamula did not inform Mrs. Grupe of the standard ratings of these securities because as he claims he believed they had no validity or whether, as she claims, they were concealed from her because if she had known of them she would not have purchased them.

Mrs. Grupe has claimed that Mr. Lamula did not advise her that the market as to most if not all of these debentures he recommended to her was thin -- that is, that there were very few debentures outstanding and normally very little market activity.

If you find that the market was in fact thin for these debentures, and if you further find that he failed to inform Mrs. Grupe of that fact, then you may find that

Mr. Lamula omitted to inform Mrs. Grupe of a fact material to her investment decision.

Mr. Lamula argues in some cases the fact that there was a thin market was actually a favorable situation because it would compel the issuing companies to buy them back prematurely at higher prices. Whether this was so again is something for you to decide as a matter of fact and for you to consider.

The testimony of both Mrs. Grupe and Mr. Lamula is in agreement that she wanted a reliable income and safe investments.

You will find that there are some numbers missing in the sequence of these questions given to you. Do not let that concern you. We have taken several separate questions and combined them thereby eliminating certain numbers so there will not be a question for every number.

The next question you will go to jumps several numbers and is question 11. If you have answered "no" to any -- I'm sorry, I have already told you about that. Maybe I didn't.

After answering this series of questions concerning matters which it is contended were omitted, you will also have to determine whether it was done with an intent to deceive, which is question 7; whether Mrs. Grupe would have purchased the securities had she known of these matters, which is question 8; and, again, the question whether you find this by clear and convincing evidence as opposed to merely preponderance of evidence, which is question 11.

Question 12 is:

Was Mrs. Grupe almost entirely dependent on Mr. Lamula for (a) guidance in selecting her investments; and (b) determination of the price at which she bought the debentures?

As bearing on a great many of these issues, you may determine whether Mrs. Grupe was a sophisticated investor or an unsophisticated investor. An unsophisticated investor is less able to obtain information from other independent market sources. Such an investor may not know how to state her investment objectives or what choices are available, or even how to understand the advice she is given.

If an investor is unsophisticated, and the broker dealer from whom guidance or information or services are sought is sophisticated in investment matters, a higher duty is imposed upon the broker dealer to fairly deal with the potential investor, the customer, and not to take advantage of the customer by misuse of broker dealer superior

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knowledge.

Therefore, while fraud may be practiced upon a sophisticated investor, too, an unsophisticated investor may be deemed more susceptible to these practices.

To determine whether Mrs. Grupe was sophisticated you should consider her testimony as to her formal education, her participation in business and stock market affairs, or her lack of it, her familiarity or unfamiliarity with the business and financial world, and her previous investment experience, or her lack of it.

You may also consider as a matter of comparison whether Mrs. Grupe's experience and training in such affairs was comparable to that of Mr. Lamula.

The fact that Mr. Lamula may have been dealing with Mrs. Grupe for his own profit does not alter the fiduciary status if you find that it was up to Mr. Lamula to decide whether or not his company itself would sell the debentures to Mrs. Grupe. If so, he was still a fiduciary and under an obligation to deal fairly with the plaintiff.

Mrs. Grupe has also charged that defendants owed duties to her of a different kind which they breached. Specifically, Mrs. Grupe charges that Mr. Lamula is someone who owes a special set of duties of fair treatment to her as one who has rightly depended upon him where he has greater skill or knowledge, and understands that he is being depended upon for guidance by the other.

Such a relationship can be found to exist between an investment adviser and a customer first where the adviser is knowledgeable and experienced and the customer is not; second, where the adviser knows he is being depended upon for guidance; and, third, where the course of dealings between the adviser and the customer increase the dependency.

If you find by a preponderance of the evidence that this was the case with Mr. Lamula and Mrs. Grupe, then you may consider him to have been her fiduciary.

The next question is 15. It is acknowledged that Mr. Lamula did not advise Mrs. Grupe of the amount of gross profit which his firm would make or did make on the sales of debentures to her. Do you find that Mr. Lamula and his company charged Mrs. Grupe an escessive amount for the securities they sold to her?

That is the question I mentioned to you earlier concerning what the market prices on the day of the sale really were.

The next question is 13-B:

Did Mr. Lamula make the purchase of securities on May 21, 1974, for the specific purpose of selling them to Mrs. Grupe, who he knew was prepared to purchase them?

That is the issue I mentioned earlier, whether he bought them for this sale or whether he held them in inventory, as he claimed.

The next question is 13-C:

If you find these answers "yes," whether this was done with an intent to deceive.

Question 14 is again the matter of whether you find this by clear and convincing evidence.

Mrs. Grupe complaints that she was charged an excessive sum for the debentures she bought. A dealer sells to a customer securities which he owns. By contrast a broker acts as his customer's representative in finding someone else who will sell the securities to his customer.

Mr. Lamula and his firm were by his claim acting here as a dealer. The law holds that if a dealer sells securities to his customer for a price which is too high, and he conceals from the customer that the securities could have been bought for much less elsewhere so as to obtain for himself that excessive profit, then the dealer has committed a fraud under the federal securities laws and under the law of the State of New York as well.

Therefore, if you determine that Mr. Lamula

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disregarded market prices in setting the prices for his sales to Mrs. Grupe, and that he deliberately charged her substantially more for them or any of them than would have been charged her if she had bought them elsewhere at market prices, then Mr. Lamula's charges were excessive.

You must also consider whether Mr. Lamula's sales prices to Mrs. Grupe were unfair and excessive because of the circumstances under which she acquired them.

It is acknowledged that Mr. Lamula's company bought most of the debentures, 120 out of the original 170, and I believe all but five or ten were sold later on, a day or two before the sale to Mrs. Grupe.

As to the initial set he purchased them on May 21st. There was an issue as to whether the sale to Mrs. Grupe occurred on May 22nd or May 23rd. If you find that Mr. Lamula's company bought these debentures with the intent of selling them to Mrs. Grupe within a day or so thereafter, then you may conclude that thehigher prices which he charges Mrs. Grupe when he sold her those issues or debentures were excessive.

By the same token, the additional five debentures of Technical Operations sold on June 3rd by Mr. Lamula were acquired by his company on that date. That sale, too, must be reviewed by you to determine whether the price was unfair and excessive for the same reason, that those debentures were bought with intent to sell them to Mrs. Grupe within the same or the next day.

In reaching your conclusion as to whether the prices charged were unfair, you may consider the prices as shown in the yellow sheets as quoted by other dealers, and particularly as quoted by Mr. Lamula's company as a basis of the fair value at that time.

You may recall a number of exhibits were prepared which were charts and schedules extracting the information and prices. If you find you need any of these to refresh your recollection as to these matters you may request them and they will be sent in to you.

Last, we come to a series of three questions which concern the defendants' affirmative defense of failure of the plaintiff to mitigate her damages.

The 16th question is:

If you have found that the debentures, or any of them, were unsuitable for Mrs. Grupe, did she act reasonably in the manner in which she sold them?

The 17th question is:

Do you find that the debentures, or any of them, were sold by L. F. Rotchschild & Company in an unreasonable manner?

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Lastly, if you find in the affirmative to either of the preceding questions, you are asked to describe which individual debentures were sold in an unreasonable manner.

Again, you may answer "all," or "none," or "some." And if you say "some" you have to specify which ones.

In this area, however, the burden of proof shifts, and the burden is upon the defendants to prove by the preponderance of the credible evidence that Mrs. Grupe failed to mitigate her losses.

Therefore, unless you affirmatively find that plaintiff or her broker at L. F. Rothschild acted inappropriately in selling the debentures as to either timing or the manner of sale, you must consider the sales made of them by Rothschild to have been a proper course of action by Mrs. Grupe.

In determining damages you must determine that plaintiff suffered monetary loss as a result of relying on defendants' statements. If any damage was due to her own actions or negligence, or through the advice of the third party or parties, she is not entitled to recover damages from the defendant for those acts.

If, on the other hand, plaintiff sustained monetary losses solely through the representations and reliance thereon by the plaintiff, then you must find for the plaintiff, and we will subsequently determine what her monetary damages were.

As you know, ladies and gentlemen, this is a civil case, so the burden is upon the plaintiff to prove every essential element of its case bya fair preponderance of the evidence except for the latter question of mitigation of damages, on which the burden is on the defendants.

However, with respect to the matter of common law fraud, as to which I have charged you earlier, you are asked this series of questions as to whether it was not merely by a preponderance of the evidence by by clear and convincing evidence.

In attempting to make these determinationa as to preponderance of evidence and as to clear and convincing evidence you should weigh in your mind that which supports the plaintiff's contentions against that which supports the defendants'. You must determine which has the more convincing force, which is the more probably correct version of the facts, which makes more sense to you.

Of course, the quality of the evidence is what is important, and not the number of witnesses presented. It is that evidence which seemed to you most likely to represent the true picture.

Now, should the conflicting evidence be evenly balanced in your mind so that you cannot tell which side preponderates, then you must find against the party carrying the burden of proof, which, except in the last issue, is the plaintiff.

The plaintiff has the burden of proving his case by a fair preponderance of the evidence, at the very least. By way of illustration, picture the scales of justice, and place the evidence for the plaintiff on the one side and the evidence for the defendants on the other side. If you find the scale tips either way, that party has prevailed. If you find the scales remain exactly even, then the plaintiff has failed to ssustain his burden, and your verdict must be for the defendant, again except for the last issue of mitigation of damages, where the process reverses.

On the other hand, and going even further, if you find that the scales tip very decisively and sharply in favor of the plaintiff so you have no doubt in your mind about the issue, then the plaintiff has proved the matter by clear and convincing evidence, which is required only on the issue of common law fraud.

In evaluating whether the plaintiff has

sustained his burden by a fair preponderance of the credible evidence or,where necessary,by clear and convincing evidence, your conclusions cannot be based upon mere speculation or conjecture.

However, you are permitted to draw reasonable inferences from the testimony heard during the trial.

Fair preponderance means that the inference from the testimony, together with the testimony itself, persuades you that the occurrence of an essential fact is more likely or probable than its non-occurrence.

In a moment you will retire to deliberate, and as you do so please be careful to listen to the opinions of the other jurors as well as to ask an opportunity to express your own views. Of course you know no one holds the center of the stage in the jury room or controls or monopolizes the deliberations. There is an opportunity to express your views, to exchange views, Don't be afraid, any of you, to change your view because of pride of opinion should you become convinced that your original view is wrong.

It is your duty to reach a verdict here unaffected by any sympathy, bias or prejudice.

You may, if you like, first have a general discussion of the case and the various things in mind, and then take up the questions individually, or you may, if you

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prefer, simply start with the questions and work your way through them one by one. That will be for you to determine in the jury room. But you must eventually give me an answer on all of the questions. They must be answered one way or the other.

If you find that you are able to answer certain questions but you are divided as to the answer of other questions, and you finally reach the position where you believe you cannot agree on the other questions, you may report back that you have been able to answer certain questions and you are hung on the other questions. Of course, we would prefer you to be able to answer all questions.

Keep in mind, ladies and gentlemen, that both sides here want a decision to be made by you. Each of them,naturally,hopes that they will get a verdict in their favor, but each wants the case to be decided. So while none of you should give in because you are outvoted, do listen carefully to the positions taken by other jurors in attempting to facilitate the course of justice by reaching a verdict for one side or the other, or, in this instance, by answering the questions one way or the other.

I must remind you that here in federal court you must agree on your verdict, all of you, unanimously. We use six-man juries in civil cases here, and twelve in

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criminal cases, so there will only be six of you deciding this, but the decision of all six of you on each question must be unanimous.

I mention this to you because some of you may have served on juries in the state court where the rules are different.

If you desire any of the exhibits they will be sent to you upon your request. If you desire to hear any of the testimony, or any portion of the Court's charge, you will be brought back into the courtroom and what you desire to hear will be read to you.

If you do not understand any of the questions as to which you are to answer, as I indicated earlier, you may come back and I will attempt to explain the question to you further.

This is an important case. Every case is important to the parties who are concerned with it. It is important to the plaintiff, it is important to the defendants, and it is your obligation to decide it solely on the evidence and the law as I have charged you.

Gentlemen, if you have any exceptions to the charge, or additions to the charge, you may approach the bench.

(At the bench:)

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MR. BLUM: I think you left out one little piece that we agreed on as a part of one of the requests for instructions, and that was the one on her investment objectives.

THE COURT: Find it for me.

MR. BLUM: I'm not sure. I may not have picked it up at the time.

THE COURT: Let's go off the record for a moment while we look for it.

MR. BLUM: It's this piece here. Did you read that?

THE COURT: Oh, yes, that was definitely read.

MR. BLUM: The other comment was --

THE COURT: To clarify the record, you read the sentence you thought I might have omitted so there will be no question as to what it was.

MR. BLUM: It was "The testimony of both Mrs. Grupe and Mr. Lamula is in agreement that she watned a reliable income and safe investments."

THE COURT: That was read.

MR. BLUM: The other was you kept saying there was an issue as to whether it was May 22nd or May 23rd, but I think the diary extract raised a question whether indeed the transactions might have been May 21st.

THE COURT: You are right on that. I will correct that.

MR. BLUM: Finally, one poine. When talking about clear and convincing you said that if there is no doubt in your mind, and I don't think it goes that far. Clear and convincing is clear and convincing. That is beyond the criminal standard.

THE COURT: I will correct that, also.

MR. GOLDSTEIN: There is one comment I would have. As far as pricing, that they could find against the corporation but not John Lamula. I think the charge as read was that if they find it was excessive they could find against him.

THE COURT: I said they could find one way or the other, against both or one or the other.

MR. GOLDSTEIN: I think when we got to the interrogatory it was not charged that way. I think your HOnor used the phrase you could find against him.

THE COURT: I am sure I charged that it would be possible to find that he did not know about it but the company knew about it and they were responsible.

MR. GOLDSTEIN: The point I am making is that was raised at the beginning, but when it came to the actual interrogatory with the explanation --

THE COURT: Off the record for a moment. See if you can find the one you are referring to.

(Discussion off the record.)

MR. GOLDSTEIN: This would be it, 13.

THE COURT: The word "and" should read "or."

MR. BLUM: I agree.

THE COURT: All right. Let's go back to the jury now.

(In open court; jury present.)

THE COURT: In my charge I mentioned to you that there was an issue as to whether or not the securities were sold to Mrs. Grupe on May 22nd or May 23rd. You will recall that there were changes made in the confirmation slips.

The plaintiff argues that you could find that the transaction actually took place as early as May 21st, because, if you will recall, there was a diary entry concerning discussion of securities purchased on May 21st by Mrs. Grupe. It is not essential for you to determine which dateit was, the 21st, 22nd or 23rd, but what you are essentially attempting to determine is whether or not the securities that were bought by Mr. Lamula on the 21st, then sold to Mrs. Grupe, were purchased by him for that specific purpose. Obviously, if he sold them to her on the 21st, and purchased them on the 21st, the proof is much stronger than if he purchased them on the 21st and didn't sell them until the 23rd, so the question of the exact date of sale is important in making that determination, but it is an underlying issue for you to consider.

You may make the determination that they were purchased as early as the 21st.

Also, I indicated to you that clear and convincing evidence would swing the scales completely. I don't mean to indicate to you that clear and convincing means that there is absolutely no possibility that the opposite is true. Clear and convincing means that it appears to be beyond reasonable doubt.

There is always some doubt, but there is not always reasonable doubt, so in deciding whether something has been proved by clear and convincing evidence you are not to take an unreasonable standard.

Finally, I indicated to you at one point that it would be possible albeit not necessary for you to determine that the prices charged to Mrs. Grupe when she purchased them were in excess of the then market price, but that this could have been done without Mr. Lamula's knowledge and have been done by other persons within this company, or it could have been done with his knowledge, so that you might find either in favor of the corporate defendant and against the individual defendant, or you might find against the individual defendant and for the corporate defendant, or you might find both of them the same way, which is to say you may find that neither Mr. Lamula nor the corporation knew that the market prices were wrong, if in fact they were wrong, or you may find that both Mr. Lamula and the other corporate employees were involved in this.

For that reason we have to amend Question 13-A slightly. I read it to you as saying, "Do you find that Mr. Lamula and his company charged Mrs. Grupe an excessive amount for the securities they sold her?"

It has been changed to read: "Do you find that Mr. Lamula or his company charged Mrs. Grupe an excessive amount for the securities sold to her?"

I think I am going to have to add down below: "In case you have answered it 'yes,' if so, which one?" And the answer to that would be Mr. Lamula, the corporation, or both, or neither. That will be inked in.

I have got it as "If so, which was responsible?"

At this time I will have the questions, which number 1 through 18, with an additional number of 5-1/2, but no questions numbered nine or ten, or fifteen, marked as Court Exhibit 1, and given to the foreman of the jury.

(Court Exhibit No. 1 was marked.)

THE COURT: At this time I will dismiss the two alternate jurors. I know it is disappointing to you, having sat here for two weeks and listened to all the evidence, not to be able to participate in the decision of the matter, but we couldn't have proceeded without you. Just like a football team can't play with just eleven players, a jury can't go forward on a trial of any length with the minimum number.

You have been very important to us, and we appreciate your having been here. If you wish to wait around anfind out how the case came out you may do that, also, because you will not be assigned to another jury today and I believe this completes your term of jury service, so whether you go home or stay here to find out how it comes out is completely up to you.

Swear the marshals.

(Marshals sworn at 11:35 a.m.)

(Jury excused.)

(In the robing room at 3:00 p.m.)

THE COURT: We have a note here which is too long to read in the record, it's two pages, and it concerns certain exhibits that they want. They listten exhibits.

MR. BLUM: I will get the pack of them.

THE COURT: Before you do that, read what they are asking for and see if there is any problem with this.

The record will reflect both counsel are reading this note.

(Discussion off the record.)

THE COURT: Try to agree on what you are sending in. List by exhibit numbers what you are sending in. If you are unable to agree upon what it is requested under any particular item on there come back to me and I will consider it independently and attempt as best I can to resolve the problem.

Do not hold back those items you agree upon because there are one or two items you are in doubt about. Give them to the clerk as soon as you have gotten those, and then come to me with the unresolved items.

MR. BLUM: Would it be useful if we were to indicate the exhibit numbers, because if they send back out anyquestion we will know what we are dealing with.

THE COURT: I hate to mark up the jury's note. Mark this as Court's Exhibit 2.

(Court Exhibit No. 2 was marked.)

THE COURT: We will put in the left-hand margin which exhibit numbers we are giving them to fulfill each of the requests, and then come back if you are in doubt about d 50

any of them.

MR. BLUM: All right.

(Recess.)

(In open court; jury not present, at 5:15 p.m.)

THE COURT: It is now a little after five-fifteen on a Friday evening. The jury has been out approximately six hours, and, of course, during part of that time they stopped to have their lunch, so they may have deliberated somewhat less than that.

I am reasonably sure everyone on that jury is completing their two weeks jury service today, because they started last week and this is the second week, and all the jurors comment on Mondays and finish on Fridays. Therefore, all our jurors are completing their service as of today. I am not inclined to keep a civil jury out much later than this. This area is not the safest, and when we keep criminal juries late we send them by limousines, and there is no provision for doing it for civil juries.

We have two alternatives. One is calling them back tomorrow, and the other is calling them back on Monday, but that may not be convenient because some of the jurors may have different plans. My present inclinations, although I am willing to listen to your suggestion, is to call the jury in and suggest unless they feel that their

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deliberations are virtually concluded that we should adjourn for theevening, but that the alternative would be to return either tomorrow, Saturday, to continue delibezations, or to return on Monday to continue deliberations, and I will suggest that they retire for a moment and take a vote as to which of those two alternatives they prefer.

MR. BLUM: They will be out for hours on that one.

THE COURT: Do you have any other suggestions to make?

MR. BLUM: No. I have a preference as between the two.

THE COURT: I am sure I know what your preference is. Your preference is my preference. But I think we have to give some consideration to the jryy, who are completing their service. Some of them may have important business obligations on Monday and would prefer coming back tomorrow, and if the majority so rules I think that's what we will do. But do either of you have anything beyond a personal preference in this?

MR. GOLDSTEIN: My personal prefernece, I am scheduled to move on Monday, but that will have to be subject to the Court and jury. There is nothing I can add.

MR. BLUM: My personal preference would be for

Monday.

THE COURT: You would personally prefer to come back Monday, and Mr. Goldstein would prefer to come back tomorrow.

MR. GOLDSTEIN: Yes.

MR. BLUM: So we will let the jury decide that one, too.

(In open court, jury present, at 5:25 p.m.)

THE COURT: Ladies and gentlemen, I have called you in because the hour is growing rather late and I didn't want to keep you here any later than was necessary,

I don't think that you have been out terribly long, considering the complexity of the case, but we have to do something with respect to your further deliberations. There are three alternatives, and I am going to send you back to the jury room to decide which of the alternatives you wish to take.

The first alternative is if you believe you are about to reach a verdict on these various questions, and if you can do so within maybe half an hour or so, and want to continue deliberating, you may do that.

But if you believe it is going to be more than another half an hour or so,then you have two other alternatives and I am going to let you take a vote and decide by majority

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vote which of the two alternatives you prefer.

Normally, I would simply bring you back on Monday, and have you continue at that time, but I know that most of you, I think all of you, are completing your term of service today, and it is possible that you have some important engagements on Monday and would prefer to get the case finished this weekend.

Consequently, if the majority of you wish to we will come back tomorrow, on Saturday, and continue deliberations on Saturday. If the majority of you prefer not to, and prefer to come back Monday, we will come back Monday and continue the deliberations. If you split fifty-fifty, I will make the decision for you.

So go out to the jury room and just make a decision on whether you want to continue deliberating now, and if not whether your preference is to come back tomorrow or Monday.

I should tell you you will get paid for your service tomorrow or Monday, whichever it is, but you don't get overtime for government jury service, so it's going to be the same payment either way, so retire now to the jury room and deliberate about your deliberations.

JUROR NO. 1: Excuse me. Do you want me to leave this material here?

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THE COURT: Take it for the moment, in case you decide you are going to continue deliberating. And if you decide you want to adjourn for the night, then you will leave it with the clerk.

(Jury excused.)

(In open court; jury not present.)

THE COURT: The note from the jury reads: "The jury has decided we cannot reach a verdict within a half hour and would prefer to return on Monday."

Monday it is.

Bring the jury back in.

Mark this as Court Exhibit 3.

(Court Exhibit No. 3 was marked.)

(In open court; jury present.)

THE COURT: Ladies and gentlemen, I received your note indicating you do not believe you can reach a verdict in a half hour and that you prefer to come back on Monday, and, consequently, you should return to Room 102. You may be in a different room because I have a different case here, but come back Monday to Room 102, and I know you have been talking about the case all day and sort of got in the routine, but you have to stop talking about it. All weekend you can't talk to anybody about it. Wait until you come back next Monday and start talking to each other about the case.

(Adjourned to November 8, 1976, at 10 a.m.)

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BERNICE C. GRUPE

vs. 75 Civ. 2083

JOHN LAMULA INVESTORS, INC. and
JOHN J. LAMULA

November 8, 1976
3:30 p.m.

(In open court; jury not present.)

THE COURT: The jury has been deliberating for the better part of two days. We do not know whether they have reached a decision on certain of the special questions asked of them or whether they are in disagreement on everything. However, our problem is, I am agreeable to leaving the jury out another couple of hours; but as you will recall upon your joint agreement, the jury is only deliberating on liability. Consequently, if we call them in at 5 or 5:30 and find that they are in agreement on certain aspects of the case, and on some of these, on one or more of these there is liability, and if it's not apparent as to what extent, they may then have to be sent out further to determine the extent of damages.

I propose to call them in now, to find out where they are staying, unless you gentlemen have some better suggestion.

MR. GOLDSTEIN: Your Honor, in view of the conversation off the record in chambers, I have no objection

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to calling them in and finding out where they stand. However, I would object to asking them to give a partial verdict at this time if they indicate that they have resolved, in their minds, some problems and not resolved others, for the reason that this period of time is really arbitrary and while they may think they have resolved some issues, it may turn out, in trying to resolve the others, that something came up and somebody may change his mind on what right now they feel has been resolved.

THE COURT: I don't understand what you are saying.

MR. GOLDSTEIN: In other words, if they make a determination on some of the questions now; they say "Yes, we have determined these questions," but they have not determined the other questions, it may very well be that in further deliberating on the questions that have not been resolved, some of them may change their minds as to the questions which they had thought they had resolved up to this point.

THE COURT: I am not going to send them back for further deliberation on liability on the undecided questions unless they indicate that they think they can decide all questions very shortly. If they indicate that they are decided on certain questions and undecided on

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others, it would be my intention to declare "a hung jury" as to the undecided questions at this time; and subsequent deliberations, if any, would only be as to damages on those as to which they have already reached a verdict.

Do you follow me?

MR. GOLDSTEIN: Yes, your Honor.

MR. BLUM: I support your Honor's proposal.

THE COURT: What you are suggesting couldn't happen. If they come in and say, "We haven't reached a verdict on everything, but we think we could if given a little additional time," then I'm not going to ask them what they have decided so far. I am going to send them back out to complete their deliberations.

MR. GOLDSTEIN: I understand what your Honor is saying, but my feeling at this time would be an all-or-nothing verdict: not on some of the issues and not the others.

THE COURT: Is it your contention that even though there are several separate causes of action, that unless they reach a unanimous verdict on all causes of action, they cannot return a verdict on any cause of action?

MR. GOLDSTEIN: No. My only feeling is this: They may decide on, say, one or two questions out of a

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possible, to be arbitrary, five questions that deal with the same issue.

Based upon those one or two, an interpretation will have to be drawn as to what they meant.

THE COURT: I agree with you. It's very possible that even with the answers, they think they have arrived at, we will be unable to conclude, with any definiteness, as to a verdict on any cause of action. That is a possibility. If we reach that possibility, we would probably then have to declare a mistrial, as to the entire cause of action or the entire case, as the case may be.

MR. BLUM: Subject to motions, presumably, under Rule 50.

THE COURT: Yes. I don't see any other alternative. If you offer me another alternative, I am willing to consider it.

MR. GOLDSTEIN: The only alternative would be declaring a mistrial altogether.

MR. BLUM: The plaintiff, your Honor --

THE COURT: I, obviously, can't do that without asking them if they have reached a verdict.

MR. GOLDSTEIN: I mean, asking them if they have reached a verdict on all questions, and if they haven't, give them until 5, 5:30, and then declare a

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mistrial if they haven't reached a decision.

MR. BLUM: The plaintiff supports the proposal you made. We can't think of any more practical approach than that which you have suggested.

THE COURT: I am not going to commit myself to anything until I have heard what the jury has to say, but I will get the jury up, to see where they stand.

MR. BLUM: We have to find out something. It's not unprecedented, but it's an exceedingly lengthy period of time.

THE COURT: It seems to me there are only two likely possibilities:

One is that they have reached a verdict in favor of the plaintiff on the lesser monetary claims and are still in disagreement about the larger monetary claims.

The other logical possibility is, they have reached a verdict for the defendant on the larger claims and are still deliberating on the lesser claims.

While I suppose there are other possibilities, those two seem the most likely. It just doesn't make sense that they would have reached the more difficult conclusion in favor of the party for whom it is the more difficult conclusion, without having reached the conclusion on the lesser included aspects. It is a possibility, but

I would think, unless they are badly confused, unlikely.

If they have reached a verdict for the plaintiff on the smaller, and are having difficulty, for example, with the punitive damages, I see no theoretical problem on bringing in a verdict for the plaintiff on the smaller claims and finding a hung jury as to the punitive claims.

Reverse, if they have found a verdict for the defendant on the punitive claims, and are still deliberating on the smaller claims, then I see no problem in finding for the defendant on the punitive and finding a hung jury for the smaller. But I do know that we can't let a civil jury on a six-day trial, sit out more than two days.

MR. BLUM: I agree with that. I think you have to find out what is going on.

THE COURT: At the very least, we may be able to clarify it if there is some single issue troubling them.

We will take a recess.

(In open court; jury present.)

THE COURT: The record should reflect, it is now 20 of 4. You have been gone quite a while, ladies and gentlemen. As you know, you are only deliberating on liability at this point, and depending upon your verdict, it could become necessary to deliberate further on damages.

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Consequently, I didn't want to let you run too late in the afternoon.

Have you arrived at a verdict?

THE FOREMAN: No, we haven't.

THE COURT: Do you think if you are given a little more time, you might be able to arrive at a verdict?

THE FOREMAN: Yes, sir.

THE COURT: All right. That being the case, I think we will send you back down and let you deliberate some more.

THE FOREMAN: May I ask a question?

THE COURT: Yes.

THE FOREMAN: We have questions on two of the questions here, which they are really a matter of interpretation, and perhaps one typographical error.

THE COURT: All right. Which ones.

THE FOREMAN: The first question is a question on interpretation, a time period.

THE COURT: Which number.

THE FOREMAN: No. 12A.

THE COURT: If you are speaking of time period, we are only concerned with the time up until when she received the debentures at issue, which is to say -- as to most of the debentures, the period involved ended on

May 30th. However, there were one or two additional purchases in June, and maybe one in July.

MR. BLUM: One in June and one in July.

THE COURT: All right. So the last purchase --

MR. BLUM: The last purchase had a trade date, I believe we can stipulate, of July 10th.

MR. GOLDSTEIN: Yes.

MR. BLUM: There was one with a trade date of June 3rd for 5,000, and one for 10,000, in face amounts, on July 10th.

THE COURT: So that the question really has a sliding chronological period. As to all but two purchases, it ends on June 1st. On one additional purchase, it goes into June, and as to the last purchase it does run into July, 10th you tell me.

MR. BLUM: I believe that is the trade date; July 17th, settlement date.

THE COURT: July 10th would be the last date on the last additional purchase.

THE FOREMAN: I think that answers that question.

THE COURT: All right.

THE FOREMAN: The other question, or possibly two questions, Question 16. Question 16 reads:

"If you have found that the debentures or any of them were unsuitable for Mrs. Grupe, did she act reasonably, in the manner in which she had them sold?"

I believe that should read "unreasonably," because Question 18 refers back to Question 16.

THE COURT: Yes, you are correct. I was worried about this problem of negatives and double negatives. The Question 17 is worded in the negative and Question 18 is worded in the negative. Consequently, 16 should have been in the negative, to be consistent with 17 and 18.

Can we agree, gentlemen, 16 to be consistent with 17, and 18 should be: Did she act unreasonably?

MR. BLUM: Yes, sir.

MR. GOLDSTEIN: Yes, your Honor.

THE COURT: If that will make that a little clearer to you. If you say "Yes," you are answering it as the defendant wants it answered. If you say "No," you are answering it as the plaintiff wants it answered.

THE FOREMAN: That's all, your Honor.

THE COURT: Good.

All right, take the jury out to continue deliberations.

JUROR NO. 2: Excuse me, is it possible I can make a telephone call to my job. There is someone standing

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by my job. After we finish today, will this be the end of us?

THE COURT: Yes, this is your last day. You will be able to make the telephone call on the way back.

Take the jury back, please.

(At 4:20 p.m., the jury returned to the courtroom.)

(Jury roll called - all present.)

THE COURT: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes, your Honor.

THE COURT: Have you written your answers to the special questions on the form provided to you?

THE FOREMAN: Yes, sir.

THE COURT: Will you give the form to the clerk, please.

Gentlemen, do you have your copies of the questions in front of you?

MR. BLUM: Yes, your Honor.

MR. GOLDSTEIN: Yes.

THE COURT: Because all I intend to do is read the answers "Yes," or "No," as I go along, and ask the jury if they agree that this is their verdict.

Question No. 1: "No."

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Question No. 2: "Yes."

Question No. 2A: "No."

Question No. 3A: "No."

Question No. 4A: "No."

Question No. 5A: "No."

5-1/2 does not have to be answered since the previous questions were not answered "Yes."

Question No. 6A: "No."

Question No. 6B: "Yes."

Question No. 6C: "Yes."

Question No. 6D: "No."

Question No. 6E: "No."

Question No. 6F: "No."

Question No. 7A: "Yes."

Question No. 7B is "D," which refers back to 6D.

Question No. 8: "Yes."

Question No. 11: "No."

Question No. 12A: "No."

Question No. 12B: "Yes."

Question No. 13A: "Yes.

Question No. 13 and the sub-question, "If so, which was responsible?," the answer is "The company."

Question No. 13B: "Yes."

Question No. 13C: "Yes."

Question No. 14: "Yes."

Question No. 16: "No."

Question No. 17: "No."

Question No. 18 does not have to be answered because of the negatives to 18 and 17.

Mr. Foreman, is this the unanimous verdict of the jury on each of these questions?

THE FOREMAN: Yes, sir.

THE COURT: Do either of you wish the jury polled?

MR. GOLDSTEIN: Yes, your Honor. I make that request.

THE COURT: You wish them polled as to a particular question or just in general?

MR. GOLDSTEIN: In general, your Honor.

THE COURT: All right. Poll the jury.

THE CLERK: Ladies and gentlemen of the jury, you have heard your verdict as it now stands recorded.

(Each juror, upon being asked by the Clerk, "Is that your verdict?," answered in the affirmative.)

THE COURT: All right. I think at this time we should retire to the robing room, leaving the jury in the box, to consider where we go from here.

The jury will remain in the box and the attorneys and the reporter will come to the robing room.

(In the robing room.)

THE COURT: The answers with respect to the affirmative defense were in the negative, so we can forget about the affirmative defense.

The first question found -- I now propose to go through them and review those which are findings in favor of the plaintiff, to see where that leaves us.

Finding No. 1, is in the plaintiff's favor. They were not suitable.

Finding No. 2, is in the plaintiff's favor; that she relied on them and he intended her to rely on the unsuitable recommendations. However, the jury did not find this, by clear and convincing evidence.

MR. BLUM: So you have a suitability --

THE COURT: You have a suitability verdict for the plaintiff.

MR. BLUM: But on statutory grounds.

THE COURT: Correct.

3A is answered "No," as to the effect that he did not make untrue statements.

That's in the defendants' favor.

4A is to the effect that he did advise her he was a market maker. The question is worded in a negative fashion. It is a double negative which comes out to the affirmative.

That's a defendants' verdict, 4A.

MR. BLUM: It's clear they understood it. Otherwise, they would have dealt with 4B.

THE COURT: Correct.

5A again is a defendants' verdict. It is a double negative. Which means 5-1/2 didn't have to be answered and wasn't.

No. 6, which is omissions, they found that he did not inform her of "A," which is the rating service, ratings, or other investment opportunities, or that she required speculative securities in order to obtain her return, and that he did not advise her of the extent of the risks involved in purchasing these; but, on the other hand, they found that he did advise her of market conditions and other material matters including their market quality.

That is sort of a mixed one, but to the extent that it has a plaintiff's finding in it, we will stick it over to the side.

They did find that he intended to deceive her by not telling her of other investment opportunities.

MR. BLUM: So you have the elements of a fraud there.

THE COURT: Yes.

In 8, they find she would not have purchased it had she known.

That is also a plaintiff's finding.

But it is not found by clear and convincing evidence, which is a defendants' finding for 11.

They find that she was dependent on him with respect to prices, but not with respect to selecting her investments. And that the company charged her an excessive amount for the securities.

That, I would say, is a finding in favor of the individual defendant and against the company.

13B is "Yes," he bought them for the specific purpose of selling them to Mrs. Grupe, and he did this with intent to deceive her.

That is found by clear and convincing evidence.

MR. BLUM: On that one, if I may, your Honor, again in fairness to the defendant, you will recall at the time that you charged them, that you said that they might regard reference to Mr. Lamula as being Lamula and his company, and we did say that in 13C. And I'm not sure therefore--and I don't want it to come out wrong if they didn't intend it that way, and I'm not sure 13B means anything other than the company.

Do you not agree with that, Howard?

MR. GOLDSTEIN: I would agree with that.

THE COURT: All right. You take 13C to refer to the company and not Mr. Lamula?

MR. BLUM: That's right.

MR. GOLDSTEIN: Yes.

MR. BLUM: In light of the answer they gave to the handwritten insertion as to which was responsible, although I would like it if 13B applied to both, I have difficulty in assuming that.

THE COURT: I will tell you, they are different questions. One concerns the market price existing at the time of the sale, and the other concerns the purchase for purposes of the sale. I don't think it necessarily follows.

MR. BLUM: I think that's right. You can't tell from 13B and 13C, whether it is against the two of them individually.

THE COURT: However, query:

Considering the other answers, it is clear that they are finding that he purchased, at least two-thirds of them, for purposes of selling to her, so it was not a riskless transaction. It is also clear that they over-priced them even in light of the market, but that this was done by the other members of the company and not Mr. Lamula. I am not certain you can say that, in and of itself, makes a common-law fraud. The over-pricing is the lesser part of the case and it is clear that she is entitled to recover the excessive pricing, which may be somewhere from $10,000 to $50,000, roughly, depending upon which standard you use. However, the recovery of the over-pricing is a lesser included claim within the suitability claim where they didn't find intent to deceive --

MR. BLUM: On the statutory claim.

THE COURT: I think she recovers on the statutory claim. She doesn't have to recover, therefore, on the over-pricing; and the finding of clear and convincing there, while I agree with it, I think is (a) immaterial, and (b) inadequate to premise a common-law fraud. In other words, I don't think we submit to the jury a punitive-damage question as against either defendant. Not because the answers are only against the company, but because the other answers of the other elements of the common-law fraud are not found by a clear and convincing standard.

MR. BLUM: It is difficult to sort out, but let me ask at this point, under Rule 50B, for a determination and an order, notwithstanding the verdict, on two aspects of this. Of course, one is on the clear and convincing question; and the other, even more importantly, which is to say Question 11, and the other is Question 12.

THE COURT: I don't believe there is a Question 11, is there?

MR. BLUM: Yes. There is a gap to Question 11.

THE COURT: Okay.

MR. BLUM: And on Question 12, 12A in particular.

THE COURT: No, I can't say that his failure to reveal the various things he could reveal has been establishe by clear and convincing evidence. The only thing, I think, was established by clear and convincing evidence, concerned the mis-pricing, and they found that by clear and convincing evidence.

MR. BLUM: But 12A, which is important, of course, for reaching toward punitive damages on a breach-of-fiduciary-duty basis, is a determination which, I think, is beyond reasonable question, wrong.

THE COURT: I don't agree with you because they have interpreted the question in a broader fashion than you do, and I think their interpretation is proper for these purposes. What they, in effect, are saying is, that she didn't have to go to Mr. Lamula. She could have gone to other people. She knew she could have gone to other people. It is true, that she let him select the investments and she took what he selected for her, but that she wasn't compelled to; but they feel that the place he did her wrong, and I agree with them, is he then went a step further and mis-priced these debentures, when he sold them to her, and she was completely relying upon him for what the prices were.

Having agreed to go to him and take what he was offering, he had a fiduciary duty, perhaps, not to mis-price them. He certainly had a duty not to mis-price them and they were mis-priced. They were mis-priced in two respects the jury has found:

The market price existing that date was misrepresented, and the fact that he purchased two-thirds of them to sell to her, making it a riskless transaction, was misrepresented.

MR. BLUM: I submit to your Honor that that plus 12B, standing alone, is a sufficient basis for reaching the question of punitive damages. That every element of breach of fiduciary obligation is present with regard to the pricing.

THE COURT: Every element of the statutory fraud is present.

MR. BLUM: Every element except the determination by the jury, which is the question which goes to them on punitive, that the breach of his fiduciary duty was wanton and willful has been established, and they have in fact found by clear and convincing evidence, that there was mis-pricing.

THE COURT: Let's go through what they did find in your favor and summarize it, and I will summarize it briefly.

He recommended unsuitable investments, and he knew that she would rely on his recommendations and did in fact so rely, and that he did not tell her about the ratings of these debentures or other suitable investments he could have made or the risks involved, and that he did this with an attempt to deceive, as to not telling her about other suitable investments: she wouldn't have purchased these securities otherwise. And that the company misrepresented the existing market price and the company and he, or Mr. Lamula, misrepresented the fact that they were purchasing these, at least two-thirds of them, to sell to her, and did so to deceive her. That's what they found.

MR. BLUM: Your Honor, in setting aside my motion, may I ask a question of procedure?

THE COURT: Let me stop to tell you, however, with respect to her reliance upon the recommendation, they found that, not by clear and convincing evidence; so in that area, and that's an essential area to common-law fraud, they found in the negative, and that knocks out your punitive claim as far as I am concerned.

MR. BLUM: Does that constitute a ruling, then, on an N.O.V. with regard to those elements? I don't urge you to do it, but quite the contrary, I wish to know because as I understand it, I think I'm entitled to reach punitives on any one of two theories, but before I could be accused of reaching --

THE COURT: Before you go to that, let's find out what remains in the rest of the case.

MR. GOLDSTEIN: First of all, I don't think they found there is a riskless transaction. Even assuming he had ordered to sell to her, I don't think there has been any testimony that a definition of "riskless transaction" goes beyond overnight, and, therefore, there may have been a risk. He may have been speculating that the price would go up or whatever. It could just as easily have gone down.

THE COURT: You are stuck either way. They found the prices were misrepresented, and also, that the purchases were made to sell to her. You are stuck for that. You are also stuck for suitability.

Now, suitability is a much bigger damage question than market pricing. If all you lost on was pricing, the verdict would be only in the 3- to 10,000 range, unless you go to punitives.

On the suitability, however, I believe he gets a statutory-fraud verdict for her losses, which is 30-some-odd thousand dollars.

MR. BLUM: 32,000-some-odd.

MR. GOLDSTEIN: Except as far as Mr. Lamula goes, I believe there are inconsistencies within the jury's verdict, which mandates a verdict for him.

THE COURT: Point them out to me.

MR. GOLDSTEIN: For instance, they find that he did not make any untrue statements to her.

THE COURT: Untrue. That means untrue affirmative statements. But he did make certain omissions.

MR. GOLDSTEIN: They find he also, in the course of recommending the debentures to her, informed her that he was selling to her, himself, as market maker for his own accounts. That is 4A.

THE COURT: But he didn't tell her he was also purchasing them right away.

MR. GOLDSTEIN: That's 5A. They found he would buy for inventory most of the debentures actually sold to her.

THE COURT: Okay. But she didn't understand that, since he was doing this, he wasn't supposed to take a market up.

MR. GOLDSTEIN: But he didn't.

THE COURT: He wasn't supposed to sell at existing market. If, in fact, he told her he was going to buy them to sell her, what she didn't realize was, if he did that, he should have commissioned it differently.

MR. GOLDSTEIN: I think they found the company charged her excessive prices, but they found that he advised her that, "I'm going to buy for inventory these issues, and I am going to sell to you."

If he had sold her, at what they considered to be market price, I don't think there would be any doubt but that it would be a defendants' verdict. They found the company sold excessively, but he told her all along what he was going to do, and did it. He told her, "I am going to buy for inventory and sell it to you out of inventory."

THE COURT: He didn't tell her what commission or profit he should have made. That's what they are, in effect, saying.

MR. GOLDSTEIN: They are saying,"the company charged," but as far as John Lamula, individually, they haven't found he did anything improper.

THE COURT: By finding he purchased to sell to her, under law he was required to take only a commission and not a profit. He took a profit. I can reconcile all these, and I don't want to argue about it any longer, because you are getting off the sticking point. You can argue all this in your motions N.O.V. The sticking point is, and I want to get over it, do you agree if they found for her on the statutory fraud claim, that the damages are that figure, $32,000; something like that?

MR. BLUM: $32,467.81.

MR. GOLDSTEIN: Against the company, I would agree. Against John Lamula, I have a problem.

THE COURT: They found against him on suitability, clearly and completely. They also found against him on omissions. He is stuck on the statutory-fraud verdict as well as the company.

MR. GOLDSTEIN: On statutory fraud, I agree, it would be 32, except I think she would have to give him credit for the money she made, the dividends.

THE COURT: The income received?

MR. GOLDSTEIN: Yes.

THE COURT: I think that is probably correct.

The income received sets off against the interest paid.

MR. BLUM: The interest on the judgment should run only --

THE COURT: Forget the interest on the judgment. The lost price plus the interest she paid on the certificate of deposit less the interest or dividends she received on the debentures during the time she held them.

MR. BLUM: Why the latter?

THE COURT: Because that offsets the capital loss on sale and the interest paid on the certificates of deposit.

MR. BLUM: No.

THE COURT: Surely it does.

MR. BLUM: It doesn't offset the capital loss.

THE COURT: It surely offsets the interest she is paying on the certificates of deposit.

MR. BLUM: No, because that interest is a net figure. The letter from the bank shows that net after charging --

THE COURT: We are not talking about the interest she got on the certificate of deposit. On two or three and maybe more of these bonds, she received interest checks before she sold them.

MR. BLUM: Three checks.

MR. GOLDSTEIN: More than that.

THE COURT: What did it amount to?

MR. BLUM: I don't see the relevance.

THE COURT: She physically got it and put it in the bank. I think that has to be offset against the net interest lost on the C.D. during the same period.

MR. GOLDSTEIN: It would be offset against the money --

THE COURT: She switched her investments, and did it by taking a loan against her C.D.'s, but she received some interest on her new investment. That has to be set off against the interest she paid out on the C.D.'s. They offset.

MR. GOLDSTEIN: It would have to be offset against the excess profit, also.

THE COURT: I think the two about equal out.

MR. GOLDSTEIN: No, they don't.

THE COURT: It's less than the interest on the C.D., I believe.

MR. BLUM: I think, your Honor is correct that the semi-annual payments she received from the debentures should be offset against the $1171.81 that she paid on the C.D.'s.

THE COURT: Do we know how much the checks add up to?

MR. GOLDSTEIN: Mr. Lamula has that, but there is another thing --

THE COURT: What's roughly the figure?

MR. GOLDSTEIN: I think she got 2,000 from Rothschild, so it would be about a thousand plus the Technical Operations. It may come to 15- to $1800. I will have to check that with Mr. Lamula.

MR. BLUM: What's being left out of the equation, however, is the fact that the lady paid interest when she bought the debentures and I think Mr. Goldstein is trying to work only one side of the street.

THE COURT: That goes to the total price.

MR. BLUM: No, I never included that in.

MR. GOLDSTEIN: That interest has to be recomputed, also, because what the bank did was charge her $1100 interest; but at the same time, they were paying her interest on the C.D.

THE COURT: The trouble with you two is, you keep losing track of each other, because you are not listening to each other.

MR. BLUM: I think I have your theory, and it is this:

First of all, the interest which she paid to the bank on the C.D. during that period of time, should be reduced or cancelled out against the interest that she got from these investments. I agree with that.

However, at no time in any of these charts, did we include the sum of 31-, 2-, or $3300 she had paid as accrued interest at the time she purchased the C.D.

THE COURT: Why not?

MR. BLUM: Because I was dealing with loss on the face.

THE COURT: I see.

MR. BLUM: And neither did we, in computing at the other end, take into consideration what she received.

THE COURT: That makes it simpler. Any interest she actually received in the way of checks, gets offset against any interest she paid in advance, towards the fact there was interest coming in.

MR. BLUM: That's correct. We cancel what she received when Rothschild sold them, against --

THE COURT: If the amount of interest received achieved the amount of interest paid, then you also carry it over against the C.D. interest.

MR. BLUM: Correct.

MR. GOLDSTEIN: Of course, what am I thinking about. It is about $3,300. Rothschild showed she got interest.

MR. BLUM: That's correct. And that gets offset against the $3,000 we didn't take in she had to pay for when she bought them.

MR. GOLDSTEIN: Wait a minute.

MR. BLUM: Those two match each other. She pays interest when she buys; pays interest when she sells. Those two match. And the Court is saying, what was in the interval the interest he got for her with these debentures, should offset against the payment that she had to make to the bank for the use of the money. I agree with that.

THE COURT: What you are saying is, there is a rough interest wash, because she pays toward it when she buys, and she gets credited to it when she sells.

MR. BLUM: That's right.

THE COURT: And they, roughly, wash out.

MR. BLUM: That's right. I think Lamula comes out a little ahead because the C.D. was paying more.

THE COURT: We are not talking about C.D.'s.

MR. BLUM: I meant, the convertible debentures paid more interest than the bank C.D., but I think we are talking relatively small amounts.

MR. GOLDSTEIN: I don't know. John would have those figures and we could go over those, the interest.

MR. BLUM: How do you propose to proceed from here, your Honor.

THE COURT: I propose to proceed by going back out and telling the jury that I understand their verdict, that the findings that they have made, mandate a finding for the plaintiff on the securities fraud statutory charge, but not by clear and convincing evidence, and for that, included within that was a finding by clear and convincing evidence that the prices were excessive, but that the excessive prices is a lesser included damage finding within the securities fraud finding, and since not every element of the securities fraud finding was found by clear and convincing evidence, that I will direct the clerk to enter a judgment for the plaintiff in the amount of her losses as proved; and that the interest paid and the interest received, both with respect to the debentures and with respect to the certificate of deposit, should be balanced off, and any balance should then be added to or subtracted from the judgment.

MR. BLUM: I think counsel and I can work that one out in entering a judgment. I think Mr. Goldstein would accept the amount of the loss of debentures as 32,000-odd, which is the purchase price less the sale

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price.

MR. GOLDSTEIN: Her losses were 31.

MR. BLUM: I don't know which is correct and we will have to check the addition. I think, 31,350 is the net amount. It is the lesser amount.

So far as motions are concerned, do you want us to preserve our rights now?

THE COURT: Yes, preserve them on the record, but I will tell you off the record.

(Discussion off the record.)

MR. GOLDSTEIN: Do you want me to make a directed verdict now?

THE COURT: You have ten days to do it.

MR. GOLDSTEIN: Do you want me to make it now?

THE COURT: You don't have to. You have ten days for motions.

(Discussion off the record.)

MR. BLUM: At this time, plaintiff respectfully moves, under Rule 50B of the Federal Rules of Civil Procedure, for a determination N.O.V. by the Court, that the elements of fraud, which the jury found with respect to suitability, and with respect to the failure to provide certain information, were clearly and convincingly shown; and plaintiff further requests that the Court determine, notwithstanding the verdict of the jury, that the preponderance of the evidence establishes that there was a breach of fiduciary duty, which entitles the plaintiff to a determination by a jury as to whether it was wanton and willful, and on either ground or both grounds, she is therefore entitled to consideration by the jury, of an award of punitive damages.

THE COURT: I think the jury did find that there was clear and convincing evidence of mis-pricing on the sale, but the jury also found that there was not clear and convincing evidence concerning the suitability issue, and I refuse to grant judgment N.O.V. on that finding.

(In open court; jury present.)

THE COURT: We have been over your findings at some length, and I must tell you that, while counsel expressed some doubt, I followed your finding precisely. I think they make sense. There was a consistency of them. They show to me you have spent a considerable amount of time on the ramifications and I think all your findings, in my opinion, make a consistent verdict.

The legal upshot of the findings you have made, factually, is that the defendant was guilty of a statutory securities fraud, but not of a common-law fraud, which could require the award of punitive damages; and while it's true, that you found by clear and convincing evidence that the pricing was misrepresented, and that the acquisition was for purposes of selling to her so that she should have been charged only a commission and not profit, that in my belief is only a part of the common-law fraud claim, and since you did not find by clear and convincing evidence that the other aspects were done with intent to deceive and by clear and convincing evidence, I am going to enter a verdict for the statutory fraud amount, which is greater substantially, and includes the mis-pricing count.

Now, the exact figure is in the neighborhood of $32,000.

You have to make an adjustment for interest paid and interest received, and you have to make a further adjustment for interest paid on the certificate of deposit, and I will leave it to counsel to prepare figures in that regard and we will enter a verdict in the plaintiff's favor. I'm not certain which of your causes of action it is, but you know, yourself, Mr. Blum, which one it will be, but it will not be the common-law fraud count, and it will be in the total amount of roughly $32,000, adjusted for interest both ways.

And I want to thank you, ladies and gentlemen, for the extensive time you have spent considering this. I know it hasn't been an easy decision for you to arrive at, and you have shown a good deal of persistence and intelligence in receiving the verdict you have reached, and I now dismiss you with the thanks of the Court.

(Jury excused.)

THE COURT: You have ten days for motions.

The judgment should be entered against both defendants.

I believe the absence of a finding of common-law fraud renders moot, to a great degree, the question I asked you before we began, about my obligations to the Securities and Exchange Commission. I don't think that a mis-pricing, which was the most severe element of the finding, standing alone, requires any action from me, but I will be willing to hear either of you on the point, if you wish to say anything.

MR. GOLDSTEIN: I think I agree with your Honor.

MR. BLUM: So do I, your Honor.

THE COURT: All right. Leave it where it is in that regard.

You have ten days for motions. You already know my decision on the motions, but you may make them if you wish to continue.

MR. BLUM: I have no desire to put a single piece of ink on paper beyond the entry of a judgment, your Honor.

THE COURT: All right. I hope you can get that together without any further squabbling.

MR. BLUM: I think we can handle the arithmetic on that.

THE COURT: Good.

- - - -

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Bernice C. Grupe	41	174	255	270
"Emerson	272			
John Galletta	330	333		
Harry Rowney	334	434	516	524
Minnie Vena	527	581	587	
John J. Lamula	589	785	892	-
Robert L. Loeb	899			
(recalled)	943	966	972	
Bernice C. Grupe	916	941		
(resumed)	974			
Dorothy Emerson	1005	1010		
John Angelo	1022	1039	1046	1052

EXHIBIT INDEX

Plaintiff	Identification	In Evidence
13		80
15		82
20		85
19		86
14		88
1		90
26		91
2 through 11		95
22		105
21		111

EXHIBIT INDEX

Plaintiff	Identification	In Evidence
30-A		120
35		127
31		130
37		131
36		132
45	159	169
32		266
41-A		269
153,154A,154B,155, 156,157,158,159,160A, 160B,161,162,163		419 419 419
165		556
168	802	
Defendant		
I-1,I-2	933	934
J	943	
K	978	978
L		980

INTERROGATORIES TO JURY

Grupe v. Lamula 75 Civ. 2083 (GLG)

1. Do you find that the debentures recommended by Mr. Lamula to Mrs. Grupe were suited to Mrs. Grupe's needs and to her investment objectives?

Yes ____________ No ✓

If you have answered Question 1 with a "Yes," please identify the individual securities bought by Mrs. Grupe which you regard as suitable.

Grupe v. Lamula 75 Civ. 2083 (GLG)

2. If you found that the debentures (or any of them) were unsuitable for Mrs. Grupe, do you find that Mr. Lamula knew or reasonably believed that the debentures were unsuitable for Mrs. Grupe when he recommended that she buy them, and that he intended that she rely upon his recommendation, and that in fact she did rely on him in buying them?

[✓ Yes] No

are these properly lumped together.

2.(a) If you have answered question 2 with a yes, do you find so not only by a preponderance of the evidence but also by clear and convincing evidence?

Yes [✓ No]

Grupe v. Lamula 75 Civ. 2083 (GLG)

3a. Do you find that during the meetings when Mr. Lamula recommended to Mrs. Grupe that she buy the debentures, Mr. Lamula made any untrue statements of fact about the debentures to Mrs. Grupe, and on which statements Mrs. Grupe reasonably relied in permitting them to be bought?

Yes________________ [✓ No________________]

3b. If you have answered question 3 with a "yes", do you find that Mr. Lamula intended to deceive Mrs. Grupe by such statements?

Yes________________ No________________

Grupe v. Lamula 75 Civ. 2083 (GLG)

4a. Do you find that Mr. Lamula did not inform Mrs. Grupe, in the course of recommending the debentures to her, that he was selling them to her himself as market maker and for his own account?

Yes______________________ [✓ No]______________________

4b. If you have answered question 4a with a "yes", do you find that Mr. Lamual omitted such information with intent to deceive Mrs. Grupe?

Yes______________________ No______________________

Grupe v. Lamula 75 Civ. 2083 (GLG)

5½
number [illegible].

If you have answered both parts of any of questions 3 through 5 with a "yes", did you so find not only by a preponderance of the evidence, but also by clear and convincing evidence?

Yes ________________ No ________________

6. In the course of recommending the debentures to plaintiff did Mr. Lamula inform her of the following matters:

a. How the leading rating services rated these debentures?

Yes ____________ [✓ No] ____________

b. What market conditions, market activity or market prices were with respect to these debentures?

[✓ Yes] ____________ No ____________

c. Of other material matters respecting the debentures, the companies issuing them, and their market quality?

[✓ Yes] ____________ No ____________

d. Of other investment opportunities of a suitable nature for her at that time which she should consider?

Yes ____________ [✓ No] ____________

e. That she could not expect to acquire $12,000 yearly from her investments unless she bought speculative securities involving great financial risk?

Yes ____________ [✓ No] ____________

f. The extent of the risks involved in purchasing these securities?

Yes ____________ [✓ No] ____________

7a. If you have answered any of the parts of question 6 "no", do you find that Mr. Lamula omitted such information with intent to deceive Mrs. Grupe?

Yes ✓ No ______

7b. If you have answered part "a" of this question with a "yes", which omissions referred to in question 6 were done with intent to deceive?

6.d.

8. If you have answered any part of question 6 "no", do you find that if Mr. Lamula had informed Mrs. Grupe of these matters, she would not have purchased the securities?

Yes ✓ No

Grupe v. Lamula 75 Civ. 2083 (GLG)

11. If you have answered "no" to any part of question 6 and if you have answered both questions 7 and 8 with a "yes", then did you so find not only by the preponderance of the believable evidence, but also by clear and convincing evidence?

Yes____________________ No ✓____________________

Grupe v. Lamula 75 Civ. 2083 (GLG)

12. Was Mrs. Grupe almost entirely dependent on Mr. Lamula for:

a. Guidance in selecting her investments?

Yes [✓ No]

b. Determination of the price at which she bought the debentures?

[✓ Yes] No

13. It is acknowledged that Mr. Lamula did not advise Mrs. Grupe of the amount of gross profit which his firm would make on the sales of the debentures to her.

13a. Do you find that Mr. Lamula ~~and~~ or his company charged Mrs. Grupe an excessive amount for the securities they sold to her?

Yes ✓ No ____

If so, which was responsible? COMPANY

13b. Did Mr. Lamula make the purchases of securities on May 21, 1974 for the specific purpose of selling them to Mrs. Grupe whom he knew was prepared to purchase them?

Yes ✓ No ____

13c. If you have answered question 13a or question 13b with a "yes", do you find that Mr. Lamula and his company did so with intent to deceive Mrs. Grupe?

Yes ✓ No ____

Grupe v. Lamula 75 Civ. 2083 (GLG)

14. If you have answered the parts of questions 13 with a "yes" answer, did you so find not only by the preponderance of the evidence, but also by clear and convincing evidence?

[✓ Yes] No

16. If you have found that the debentures or any of them were unsuitable for Mrs. Grupe, did she act reasonably in the manner in which she had them sold?

Yes__________________ No ✓

Grupe v. Lamula 75 Civ. 2083 (GLG)

17. Do you find that the debentures or any of them were sold by L. F. Rothschild & Company in an unreasonable manner?

Yes [✓ No]

Grupe v. Lamula 75 Civ. 2083 (GLG)

18. If you have answered questions 16 or 17 with a "yes," please identify the individual debentures which were sold in an unreasonable manner.

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------X

BERNICE C. GRUPE

Plaintiff

against

JOHN LAMULA INVESTORS INC. and
JOHN J. LAMULA

Defendants

-----------------------------------X

75 Civ. 2083

(GLG)

~~COUNTER~~ JUDGMENT

47,051

U.S. DISTRICT COURT
FILED
NOV 26 1976
S.D. OF N.Y.

This action having come on for trial before the court and a jury, HON. GERALD L. GOETTEL, United States District Judge, presiding, and the jury having duly rendered its special verdict in the form of special written findings upon written questions submitted to it by the court in accordance with Rule 49 (a) F.R. Civ.P., it is hereby

ORDERED AND ADJUDGED that Plaintiff, Bernice C. Grupe, residing at 329 Evans Street D, Williamsville, New York, recover, jointly and severally, of defendant, JOHN LAMULA, residing at 15 West 12 Street, New York, New York, and Defendant, JOHN LAMULA INVESTORS, INC. with its offices at 116 John Street, New York, N Y, the sum of $29,311.96, with interest thereon at the rate of six (6%) percent per annum from August 14, 1974 to the date hereof, together with costs of the action to plaintiff in accordance with law.

Dated; New York, N Y
November 26 1976

Gerald L. Goettel
JUDGE of the United States
District Court for the Southern
District of New York

JUDGMENT ENTERED:
Raymond F. Burghardt - 11/29/76
CLERK

MICROFILM
NOV 29 1976

A-1338

BILL OF COSTS

Goettel, J.

Form A. O. 133 (1-63)

BILL OF COSTS 22

on Judgt. # 77,051

United States District Court
for the
SOUTHERN DISTRICT OF NEW YORK

BERNICE C. GRUPE,
Plaintiff,
vs.
JOHN LAMULA INVESTORS, INC. and
JOHN J. LAMULA,
Defendants.

CIVIL ACTION FILE NO.
75 Civ. 2083 (GLG)

Judgment having been entered in the above entitled action on the 26th day of November, 19 76, against John Lamula & John Lamula Investors, Inc. the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$ 15.00
Fees of the marshal	6.36
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	
Fees and disbursements for printing	
Fees for witnesses (itemized on reverse side)	139.00
Fees for exemplification and copies of papers necessarily obtained for use in case *	212.00
Docket fees under 28 U. S. C. 1923	
Costs incident to taking of depositions	1,823.65
Cost as shown on Mandate of Court of Appeals	
Other Costs (Please itemize)	
*certified copies of National Quotation Bureau daily quotation sheets	
Total	$2,196.01

U. S. DISTRICT COURT
FILED
DEC 3 1976
S. D. OF N. Y.

State of New York
County of New York } ss:

I, ROBERT M. BLUM do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day ~~mailed~~ handed to Baratta & Goldstein, 1250 Broadway, N.Y., N.Y. 10001 ~~with postage fully prepaid thereon.~~

Please take notice that I will appear before the Clerk who will tax said costs on November 24, 19 76 at 11 A.M.

SILBERFELD DANZIGER & BANGSER
Robert M. Blum
Attorney for Plaintiff

Subscribed and sworn to before me this 2nd day of November, A. D. 1976
at New York, New York

LINDA L. CASTRILLI
Notary Public, State of New York
No. 31-4513125
Qualified in New York County
Commission Expires March 30, 1977

Linda L. Castrilli
Notary Public.

Costs are hereby taxed in the amount of $ 2,196.01 this 3rd day of December, 1976, and that amount included in the judgment.

Raymond F. Burghardt
Clerk.

By Maria Arnaldo
Deputy Clerk.

NOTE: SEE REVERSE SIDE FOR AUTHORITIES ON TAXING COSTS

12/3/76 - No appearance in opposition. Bill of Costs as taxed in the sum of $2,196.01, in favor of plaintiff, as against
11:45 A.M. - defendants, and added to the judgment.
Raymond F. Burghardt
CLERK

Witness Fees (computation, cf. 28 U. S. C. 1821 for statutory fees)

Name and Residence	Attendance		Subsistence		Mileage		Total Cost Each Witness
	Days	Total Cost	Days	Total Cost	Miles	Total Cost	
HARRY C. ROWNEY 12 Brandon Drive. Mt. Kisco, N.Y.	2	$40.00			160	$16.00	$ 56.00
GOLDBERG, ABRAMOWITZ, KUFLIK & KAUDER, 75 Maiden La., N.Y., N.Y. subpoena duces tecum	1	20.00			10	1.00	21.00
JOHN GALLETTA, L.F. ROTHSCHILD & CO. 99 William Street, N.Y., N.Y.	1	20.00					20.00
JOHN LAMULA INVESTORS, INC. 116 John St., N.Y., N.Y. Subpoena duces tecum	1	20.00			10	1.00	21.00
JOHN ANGELO 300 Central Park West New York, New York	1	20.00			10	1.00	21.00
					TOTAL		139.00

NOTICE

Section 1924, Title 28, U. S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54 (d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but cost against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6 (e)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

"The entry of the judgment shall not be delayed for the taxing of costs."

RECEIVED
NOV 2 [illegible] 197[illegible]
BY
BARATTA & GOLDSTEIN

A-1340

12/3/76 - No appearance in opposition. Bill of costs as taxed in the sum of $2196.01, in favor of plaintiff as against defendants, and added to the judgment

Raymond F. Burghardt
CLERK

DEFENDANTS' NOTICE OF MOTION FOR ORDER SETTING ASIDE JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-------------------------------------X

BERNICE C. GRUPE,

Plaintiff,

75 Civ. 2083
(GLG)

-against-

JOHN LAMULA INVESTORS, INC. and
JOHN J. LAMULA,

Defendant.

-------------------------------------X

U.S. DISTRICT COURT
FILED
DEC 09 1976
S.D. OF N.Y.

SIRS:

PLEASE TAKE NOTICE, that on the 17th day of December, 1976, at 10:00 o'clock in the forenoon of that date, or as soon thereafter as counsel can be heard, the Defendants, JOHN LAMULA INVESTORS, INC. and JOHN J. LAMULA, will move this Court, before the Honorable GERALD L. GOETTEL, United States District Judge, in Room 906 of the United States District Court for the Southern District of New York, pursuant to Rule 50 (b) of the Rules of Civil Procedure, for an order setting aside the general verdict and judgement entered herein on the 29th day of November, 1976, and to enter judgement for the Defendants notwithstanding the verdict. In the alternative, and in the event the Defendants' motion for judgement nothwithstanding the general verdict is denied, the Defendants move the Court to order a new trial.

MICROFILM

#6

The grounds for this motion are set forth in the memorandum annexed hereto and made a part hereof.

DATED: New York, N Y
December 5 , 1976

BARATTA & GOLDSTEIN

BY:
HOWARD J. GOLDSTEIN
A Member of the Firm
Attorneys for Defendant
1250 Broadway
New York, N Y 10001
(212) 736-8088

TO: SILBERFELD, DANIZER
& BANGSER
Attorneys for Plaintiff
230 Park Avenue
New York, N Y

PLAINTIFF'S NOTICE OF CROSS-MOTION FOR ATTORNEYS FEES, ETC.

DEC 27 1976
S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

BERNICE C. GRUPE, : 75 Civ. 2083 (GLG)

Plaintiff, :

-against- : NOTICE OF CROSS-MOTION

JOHN LAMULA INVESTORS, INC. :
and JOHN J. LAMULA,
:
Defendants.
:
- x

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Robert M. Blum, Esq., sworn to December 20, 1976, and the exhibits thereto annexed, plaintiff will cross-move this court, before the Hon. Gerard L. Goettel, United States District Judge, in courtroom 906, United States Courthouse, Foley Square, New York, New York, at 10 A.M. on December 29, 1976, or as soon thereafter as counsel may be heard, for an order:

1. In the sound exercise of the discretion of the court pursuant to the final sentence of §11(e) of the Securities Act of 1933, as amended (48 Stat. 74; 15 U.S.C. §77k(e)), awarding to plaintiff and against defendant John Lamula Investors, Inc. the sum of $7,838.28 as additional costs, inclusive of her reasonable attorneys' fees with respect to establishing that said defendant, with intent to deceive her, acquired the convertible debentures in question for the purpose of selling them to her and sold them to her at an excessive price;

2. Alternatively, if the relief sought by defen-

dants' motion pursuant to Rule 50(b), F.R.Civ.P. be granted in any respect, awarding to plaintiff, and fixing punitive damages as against defendant John Lamula Investors, Inc.; and

3. Granting such other relief as the court may deem proper.

Dated: New York, New York
December 20, 1976

SILBERFELD, DANZIGER & BANGSER

By
A Member of the Firm
Attorneys for plaintiff
230 Park Avenue
New York, New York 10017
(212) 889-8400

To: BARATTA & GOLDSTEIN, ESQS.
Attorneys for defendants
1250 Broadway
New York, New York 10001
(212) 736-8088

AFFIDAVIT OF ROBERT M. BLUM, ESQ., FOR PLAINTIFF, IN SUPPORT OF CROSS-MOTION FOR ATTORNEYS FEES, ETC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

BERNICE C. GRUPE, : 75 Civ. 2083 (GLG)

Plaintiff, :

-against- : **AFFIDAVIT IN SUPPORT OF CROSS-MOTION**

JOHN LAMULA INVESTORS, INC. and JOHN L. LAMULA, :

Defendants. :

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT M. BLUM, being duly sworn, says:

1. I am a member of the firm of Silberfeld, Danziger & Bangser, attorneys for plaintiff; and served as trial counsel. This motion seeks the award to plaintiff, in the court's discretion, of the sum of $7,838.28. Such sum constitutes the costs, including reasonable attorneys fees, incurred by plaintiff in prosecuting the portions of her claim as to which defendants interposed defenses so lacking in merit as to be virtually a sham or frivolous.

2. The court will recall that plaintiff tendered two claims: the first for damages relating to the losses she suffered on the purchase and subsequent sale of the convertible debentures; the second for damages or an accounting relating to the improper and excessive pricing procedures utilized by defendants in selling the convertible debentures to her. In finding for plaintiff on both claims, the jury specifically determined that the second claim was proved "by clear and convincing evidence." Plaintiff contends by this motion that the defense against this second

claim was (while stridently presented) so lacking in merit as to border on the frivolous.

3. Plaintiff paid my firm an aggregate fee of $12,969 for services rendered with respect to both claims, and the prosecution and trial of the action. She has also paid to date disbursements in the aggregate sum of $3,229.81; and a bill is currently being issued to her for the additional sum of $1,673.76, for an aggregate of disbursements of $4,903.57. Copies of these bills are attached as exhibits 1 through 4. When the fees and disbursements are added together, they total $17,872.57 -- the total sum paid or to be paid by plaintiff for such service.* From this aggregate amount, plaintiff subtracts the costs taxed against defendants on December 3, 1976 in the amount of $2,196.01, pursuant to Rule 54(d), F.R.Civ.P.

4. The net amount resulting from the calculations described in the preceeding paragraph is $15,676.56, one-half of which, $7,838.28, fairly represents the allocation of effort by my firm and me in preparing for trial on plaintiff's second claim.

5. The court's attention is respectfully invited to the findings of the jury on question 13a, 13b, 13c and 14, the findings which confirm the utter lack of merit in the defense presented on this aspect of the case. I devoted fully one-half of my preparation time and of my trial time to the defendants' market-making and price determination practices. This entailed: (i) detailed examination of the

---

* The disbursements hereinabove referred to do not include the fee of Harry C. Rowney, who testified as an expert on questions of suitability; since Mr. Rowney's testimony touched only tangentially on pricing practices.

yellow sheets; (ii) conferences with the head of the bond trading department of Drexel Burnham & Co.; (iii) four discussions with John Angelo, arbitrage partner and principal trader for L. F. Rothschild & Co. in debentures of this kind; (iv) two discussions with representatives of the National Quotation Bureau, Inc.; (v) intensive research into the applicable law; (vi) the preparation of a Request for Admissions and applicable portions of the pre-trial order; (vii) the examination on trial of defendant Lamula and of his secretary, Mini Vena, as well as the cross-examination of each of them; and (viii) the preparation by my legal assistants of charts and visual exhibits for use in presenting this difficult subject matter to the jury in comprehensible form.

6. My firm usually bills my time at $80 hourly, and that of my partner, Robert M. Dubow, former staff counsel of the SEC, who assisted me in numerous aspects of the case, at $60 hourly. My associates, Judy A. Bluestein, Esq., and James G. Samson, Esq., were occasionally occupied with the preparation of materials relative to this aspect of plaintiff's case; their hourly billing rates are $40 and $50 respectively. The time of our legal assistant, James Stahl, is billed at $25 hourly. Upon information and belief, all of these rates are standard and usual for attorneys and paralegals in law firms specializing in commercial and securities matters in New York City.

7. In point of fact, the actual expenditure of attorney and paralegal time, as daily recorded and monthly printed out by the computer service which tracks our time records, was in amounts normally billable at far beyond

$12,969 of such time. However, an agreement with plaintiff limited our billings to her for services through trial to the amounts already billed, plus disbursements.

8. Plaintiff's efforts to settle respecting this patent aspect of defendants' wrongdoing were consistently rebuffed. At pre-trial conferences before the Hon. Harold J. Raby, U.S. Magistrate, defendants declined to tender or apparently even to consider plaintiff's tender of, an offer of settlement. The court may recall the first pre-trial conference, in which it met with Howard J. Goldstein, Esq., defendants' attorney, and me on May 27, 1976. At such time, I presented the court and Mr. Goldstein with specific indication of the pricing practices which had been utilized by defendant John Lamula Investors, Inc.; and the court urged Mr. Goldstein to consider settlement. No settlement proposal was ever received.

9. Under the circumstances, I respectfully urge that the reasonable attorneys' fees and other costs incurred by plaintiff in trying this aspect of her claim was $7,838.28; and that it has been established that defendants' defense thereto was without merit, bordering on the frivolous.

Robert M. Blum

Sworn to before me this
20th day of December, 1976

Linda L. Castrilli

LINDA L. CASTRILLI
Notary Public, State of New York
No. 31-4513125
Qualified in New York County
Commission Expires March 30, 1977

EXHIBIT 1 TO BLUM AFFIDAVIT - BILL DATED
MARCH 3, 1975

6078

March 3, 1975

. Bernice C. Grupe
1 Evans "A" Street
lliamsville, New York 14221

Retainer for services to be performed in pursuance of client's claim against John Lamula and Lamula Investors, Inc. $4,000.00

EXHIBIT 2 TO BLUM AFFIDAVIT - BILL DATED MAY 21, 1976

6677

May 21, 1976

Bernice C. Grupe
Evans Street D
lliamsville, New York 14221

On account of services rendered to April 30, 76 in Grupe v. Lamula, et al., a civil action the United States District Court for the thern District of New York $2,000. 00

Disbursements:

ller Reporting Service transcript)	$ 817.40	
vertime secretarial services	98.25	
ational Quotation Bureau	128.00	
nsportation and fares	104.12	
otocopies	136.35	
stage	7.60	
ng Distrance Telephone	76.74	
als	18.55	
		1,387. 01
TOTAL		$3,387.01

CLIENT # 09935-9

MATTER NOS. 1

TIME THRU [illegible]

CC

EXHIBIT 3 TO BLUM AFFIDAVIT - BILL DATED AUGUST 21, 1975

6314

August 21, 1975

ernice G. Grupe
ans Street A
amsville, New York 14221

As at July 31, 1975 reppecting claim and action commenced against, John Lamula Lamula Investors, Inc., as follows:

Attorney	Billing Rate	Time Spent	Amount		
. Blum	$ 75	43.95	$3,298.		
. Dubow	55	17.45	961.		
Bluestein	35	14.30	501.		
Grunebaum	45	4.65	209.		
		80.35	$4,969.	$4,969 00	
Less retainer				4,000 00 Retainer	$ 969.00

DISBURSEMENTS (from December 1974 to July 31, 1975)

Long distance telephone	$50.39	
Postage	1.30	
Photocopies	60.10	
Carfares	9.85	
Filing fee (United States District Court)	15.00	
U. S. Marshal's fee (service of summons and complaint)	6.36	
Overtime secretarial service	56.25	8 199.25
TOTAL		$1,168.25 4 5168.25

VL

Cv-6078
4000-

EXHIBIT 4 TO BLUM AFFIDAVIT - BILL DATED
NOVEMBER 24, 1975

6431

November 24, 1975

. Bernice C. Grupe
Evans Street D
[illegible]ville, New York 14221

On account of services rendered to ober 31, 1975 in Grupe v. Lamula, et al., ivil action in the United States District rt, Southern District of New York — $2,000.00

DISBURSEMENTS

Baratta & Goldstein -- copies of documents	$ 9.75	
Lunch expenses	41.71	
Adler Reporting Service -- deposition expense	1,006.25	
Photocopies	40.65	
Postage	1.10	
Long distance telephone	3.21	1,102 67 6
Total		$3,102 67

SN

CLIENT #. 9935-9
MATTER NOS. 1
TIME THRU NO TIME REMOVED

REPLY AFFIDAVIT OF JOHN J. LAMULA, FOR DEFENDANTS, IN OPPOSITION TO CROSS-MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------------------------------------X

BERNICE C. GRUPE,

Plaintiff,

-against-

JOHN LAMULA INVESTORS, INC. and
JOHN J. LAMULA,

Defendants.
---------------------------------------X

75 Civ. 2083
(GLG)

REPLY AFFIDAVIT

U. S. DISTRICT COURT
FILED
DEC 28 1976
S. D. OF N. Y.

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

JOHN J. LAMULA, being duly sworn, deposes and says:

I am the individual defendant, as well as the principal of the corporate defendant herein, and submit this affidavit in opposition to the cross motion of the plaintiff seeking reimbursement for counsel fees.

In order to support a claim for reimbursement of reasonable expenses, as provided for under § 11(c) of the Securities Act, there must be a showing that the defenses herein not simply lacked merit but bordered on frivolity. Can-Am Petroleum Co. v. Beck 331 F.2d at 374; Katz v. Amos Treat Co. 411 F.2d 1046. Rather than subject the Court to protracted recitation and repetition, I should simply like to point out:

1. The answers to the interrogatories fail wholly to support the contention of frivolity; and

2. The discussion in the robing room as reflected on page 1187 through 1206 are even more indicative of the lack of frivolity of the position of the defendant.

WHEREFORE, the defendant respectfully submits that the cross motion for counsel fees be denied.

John J. Lamula

Sworn to before me this
28th day of December, 1976

Sherrie Schwartz

SHERRIE SCHWARTZ
COMMISSIONER OF DEEDS
City of New York No. 2-2158
Certificate filed in New York County
Commission expires September 1, 1977

ENDORSEMENT ORDER DENYING POST-TRIAL MOTIONS

U. S. DISTRICT COURT
FILED
JAN 20 1977
S. D.

ENDORSEMENT

BERNICE C. GRUPE v. JOHN LAMULA INVESTORS, INC. and JOHN J. LAMULA, 75 Civ. 2083 (GLG)

Following a jury trial in which a verdict was entered for the plaintiff, the defendants have moved to set aside the verdict, for judgment notwithstanding, or for a new trial. The plaintiff has cross-moved for attorneys' fees and, alternatively, if defendants' motion is granted, for an award of punitive damages. All motions are denied.

The jury was confronted with several causes of action which had differing burdens of proof and differing possible damages. They answered a series of special interrogatories following prolonged deliberations. The jury's responses found for the plaintiff in certain respects and for the defendants in others. In my opinion, the findings of the jury were, in all respects, supported by the evidence presented. The jury found that the securities recommended by the defendants were not suitable for the plaintiff and that defendants knew it at the time and intended the plaintiff to rely upon these recommendations, which she in fact did. The jury further found there were overt misrepresentations concerning the proper price for the securities purchased.

Defendants rely most heavily upon the Supreme Court's decision in Ernst & Ernst v. Hochfelder, 96 S.Ct. 1375 (decided March 31, 1976). That case concerns the liability of accountants who were charged with aiding and abetting someone else's fraudulent actions by failing to conduct adequate audits. The cause of action was based on a theory of negligent nonfeasance. The Court concluded that Section 10(b) of the Securities Act of 1934 was intended to proscribe intentional misconduct and, consequently, private actions under it must involve "some element of scienter" and not merely negligent conduct. This construction, of course, is supported by the Senate Report on the 1934 Act which stated:

> The bill provides that any person who unlawfully manipulates the price of a security, or who induces transactions in a security by means of false or

MICROFILM
JAN 26 1977

> misleading statements, or who makes a false or misleading statement in the report of a corporation shall be liable in damages to those who have bought or sold the security at prices affected by such violation or statement. In such case the burden is on the plaintiff to show the violation or the fact that the statement was false or misleading, and that he relied thereon to his damage. The defendant may escape liability by showing that the statement was made in good faith. S. Rep. 792, 73d Cong. 2d Sess. 12-13 (1934).

When applied to a case charging a security dealer with making material omissions to consummate a sale, it would appear that the plaintiff makes a case by showing the misleading statements and reliance and that the burden then shifts to the defendant to establish that the misleading was unintentional and negligent. While it is questionable, therefore, whether scienter per se is required in a case of this nature, the factual findings of the jury indicate that they made such a determination. (No specific question in that regard was put to the jury by the defendants.) There are no grounds for setting aside the jury's verdict.

With respect to the plaintiff's cross-motion, it is true that the misrepresentation of market prices as to most of the securities was clearly established. However, this was only an alternative theory and one which would have produced lesser damages. Since the defendants were compelled to defend themselves against other causes of action (and, indeed, prevailed on the common law fraud cause of action), this does not appear an appropriate case for the exercise of discretion in awarding attorneys' fees. Katz v. Amos Treat Co., 411 F.2d 1046.

Since defendants' motion was not granted, there is no need to consider plaintiff's alternate motion. All motions are denied.

SO ORDERED:

Dated: New York, N.Y.,
January 19, 1977.

Gerard L. Goettel
U.S.D.J.

NOTICE OF APPEAL

U.S. DISTRICT COURT
FEB 16 11 31 AM '77
S.D. OF N.Y.

Fee Pd $5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------x

BERNICE C. GRUPE,

Plaintiff,

-against-

JOHN LAMULA INVESTORS, INC. and
JOHN J. LAMULA,

Defendants
-----------------------------------x

75 Civil 2083
(GLG)

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that defendants JOHN LAMULA INVESTORS, INC., and JOHN J. LAMULA, hereby appeal to the United States Court of Appeals for the Second Circuit, from the final judgment entered in this action on the 29th day of November 1976, and from the order denying said defendants' motion to set aside the verdict, for judgment notwithstanding the verdict, and for a new trial entered in this action on the 19th day of January 1977, and from each and every part of said judgment and order.

Dated: New York, New York
February 16, 1977

PLUNKETT, WETZEL & JAFFE
By: Michael R. Treanor
Michael R. Treanor, member
of the firm
Attorneys for Defendants-Appellants
20 East 46th Street
New York, N.Y. 10017
212 687-7210

TO:

CLERK OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Silberfeld, Danziger & Bangser
Attorneys for Plaintiff-Appellee
230 Park Avenue
New York, N.Y. 10017
212 889-8400

Issued
C of D +
40 DAY
NOTICE
2/16/77

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

JULIO VALLEJO, JR., being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 703 REMSEN AVE. BROOKLYN, NYC.

That on the 25th day of APRIL, 1977, deponent personally served the within JOINT APPENDIX - VOLUME III OF III upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true copy of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

SILBERFELD, DANZIGER & BANGSER
Attorneys for Plaintiff-Appellee
230 Park Ave.
New York, N. Y. 10017

Julio Vallejo, Jr.

Sworn to before me this

25th day of APRIL, 1977.

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979